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284-A

VOL. 95 (2d Series) June 1–30, 1984 No. 2

FEDERAL COMMUNICATIONS COMMISSION REPORTS

(95 F.C.C. 2d)

Doc. Ctr.
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7761
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Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 95 (2d Series)
Pages 457 to 1021

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-CJL B/cing, Inc.
BC Docket No. 80-323

Application for Review

Application for review of Bureau's ruling denying Fairness Doctrine and personal attack complaint against radio station licensee denied. Complainant failed to substantiate that licensee acted unreasonably.
-Florida Power and Light Co.

Application, Mutually Exclusive

Sections 73.3539 and 73.3516(e)(i) of rules waived and deadline established for filing petitions to deny and mutually exclusive applications. United States Court of Appeals vacated to an extent Commission order, *RKO General, Inc.*, 82 FCC 2d 291 (1980) and remanded the matter for further proceedings consistent with the court's opinion.
-RKO General, Inc.

Candor

Review Board denied renewal of mobile telephone license and related application where applicant, a sole proprietor, deliberately and continually lied in license application, yearly reports and correspondence. Other renewal applications are returned to Common Carrier Bureau for independent consideration.
-Mobilfone Communications
CC Docket No. 82-15

Candor

I.D. affirmed. One of three applicants disqualified for deliberate lack of candor at hearing. Substantial integration preference outweighed slight-to-moderate diversification preference. Rejected allegations of regional concentration of control; trafficking; poor past broadcast record. Good cause shown for amending main studio location to comply with Section 73.1125 promptly after summary decision denied.
-Old Time Religion Hour, Inc.
BC Docket No. 80-445

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–Wentronics, Inc.

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–Chicago SMSA LTD. Partnership

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–Amendment of Part 90
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–Coastal Bend Family TV, Inc.
BC Docket No. 80–460

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Docket No. 21502

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Rules, Amendment of
Subscription Television

Commission eliminated its existing application requirements for subscription television ("STV") operation and substituted a simple notification procedure. Subscription television stations may operate at variance with those television signal quality standards applicable to conventional broadcast facilities.
–*Amendment of Part 73*
Docket No. 21502

FCC 83–485

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 73 of the Commission's Rules and Regulations In Regard to Section 73.642(a)(3) and Other Aspects of the Subscription Television Service.	Docket No. 21502 RM-2737

FOURTH REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: October 19, 1983; Released: November 16, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT; COMMISSIONER DAWSON CONCURRING IN THE RESULT.

Introduction

1. This document generally concludes the comprehensive review, begun in 1977, of our rules, requirements and policies governing subscription television ("STV") operations.[1] To date, this review has resulted in elimination of the bulk of our former regulations relating to STV, including: (1) the restriction that only one station in a community could engage in STV operations (the "one to a community" rule),[2] (2) the limitation of STV operations to communities within the Grade A signal contour of at least five commercial television stations, including that of the STV operator (the "complement of four" rule), (3) the requirement that STV stations broadcast at least

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[1] Two notices have been released in this proceeding: *Notice of Inquiry and Proposed Rule Making* in Docket No. 21502, 67 F.C.C. 2d 202 (1977); and, *Further Notice of Proposed Rule Making* in Docket No. 21502, 88 F.C.C. 2d 213 (1981).

[2] *See First Report and Order* in Docket No. 21502, FCC 79–535, 44 Fed. Reg. 60091 (1979).

28 hours of conventional programming per week, (4) the prohibition on the sale of STV decoders, and (5) the obligation that STV applicants ascertain the needs and interests of their communities specifically with regard to subscription programming.[3] Now before us for consideration are two final issues concerning the STV service. The first issue, whether STV stations should be required to comply with those television technical standards, largely in the audio performance area, not currently met by STV facilities, is the last of five issues raised in the *Further Notice of Proposed Rule Making* in this proceeding which remains to be resolved. The second issue, whether the present application requirements for STV authorization should be eliminated, we raise on our own motion. We do so in order to consider the continuing appropriateness of our application requirements for STV in view of the fundamental changes in our substantive regulation of this service implemented by this and previous actions in this proceeding.[4]

STV Technical Requirements

2. *Introduction*. In the *Fifth Report and Order* in Docket No. 11279, the Commission adopted rules governing STV equipment and system performance capability. These technical rules include standards addressing both the interference potential and signal quality of STV systems. Commission advance approval for STV technical systems heretofore has examined compliance only with the interference criteria. At the time an STV authorization is to be granted, compliance with the signal quality standards is examined. None of the present operating STV systems granted advance approval to date complies with all of these standards. The specific areas of noncompliance are largely in the audio performance area while the system is operating in a scrambled mode. STV signals exhibit either more noise than conventional signals or reduced frequency response or have both of these difficulties.

3. Because of the failure of STV technical systems to comply with all present television technical standards, no STV station has been issued an authorization. As a result, all stations now operate pursuant to program test authority ("PTA").[5] Because this procedure

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[3] These last four regulatory restraints were removed by Commission action in the *Third Report and Order* in Docket No. 21502, 90 F.C.C. 2d 341 (1982), 47 Fed. Reg. 30069 (1982). Additionally, in the *Second Report and Order* in Docket 21502, 85 F.C.C. 2d 631 (1981), 46 Fed. Reg. 19937 (1981), the Commission held that mutually exclusive applications for a new television station where one or more applicant contemplates STV operation should be compared by traditional comparative criteria and not on the basis of the applicants' STV program proposals.

[4] Because this issue concerns Commission practice and procedure, prior notice and comment proceedings are not required. *See* 5 U.S.C. §553(a)(3)(A), and Section 1.412(b)(5) of the Commission's Rules.

[5] *See* Section 73.1620 of the Commission's Rules.

is neither administratively efficient nor certain, in the *Further Notice* in this proceeding we proposed three alternative solutions to remedy the situation: (1) allowing all STV stations to be at variance with the receiver signal quality standards; or (2) establishing goals and timetables for compliance with all technical standards; or (3) grandfathering existing STV stations but requiring all STV stations entering new markets to meet present technical standards.

4. *Comments.* None of the commenters suggest that STV operators be required to comply with all television technical standards. All but one of the parties favor requiring STV stations to comply with standards governing the degree to which stations may interfere with each other. They believe that the present procedure for advance approval for STV technical systems should continue to satisfy this requirement. Most commenters further submit that all STV stations should be permitted to operate with signal quality standards no more stringent than the technical systems already granted advance approval by the Commission.

5. There was some question among the parties as to whether STV equipment is technically capable of complying with the television reception standards. Oak Industries believes that it is unlikely that the operation of an STV decoder can result in signal characteristics identical to those of a broadcast transmitter. In any event, the commenters agree that even if STV decoder hardware can be redesigned to correct the audio response problem, such a correction is not economically desirable. The Subscription Television Association asserts that such a correction would add 15 percent to the cost of decoders and that the STV operator would have to recover this cost through higher subscription fees or installation charges to consumers.[6] It further contends that strict compliance with reception standards would have the effect of upsetting the economic balance of many existing STV operations and thus would undermine the competitiveness of future STV service.

6. The parties further allege that the financial burden that would result from modifying the STV decoder to meet reception standards is not necessary. First, they are unaware of any complaints by consumers who have experienced interference or poor reception capability as a result of an operator's deviation from the Commission's strict technical requirements. Second, and they assert of greater consequence, any transmission or reception problem at the subscriber's end quickly could undermine the public's favorable perception of STV and lead to its rapid demise.[7] Therefore, the commenters maintain that strict compliance with reception stan-

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[6] Because decoders cost between $100 and $200, it is estimated that redesigning STV decoder hardware to correct the audio response problem would cost between $15 and $30.

[7] American Broadcasting Companies, Inc., notes that the typical STV household,

dards currently is not necessary and, if it becomes so, the marketplace will effectively demand such compliance without necessitating any government action. Accordingly, these parties favor an indefinite waiver of the rules concerning broadcast reception requirements for STV.

7. Only Telease, Inc., recommends that the Commission continue the practice of examining each system to determine whether it can be authorized for operation either under a special temporary authorization or under program test authority. According to this commenter, there is no critical or pressing need for the Commission to decide now on the extent to which it will enforce its technical standards. Thus, it submits there is no reason not to continue the current case-by-case, temporary authorization approach.

8. *Discussion*. We disagree with Telease that there is no critical need to resolve the issue of which technical standards are to govern scrambled broadcasts. Until technical requirements are clarified, the Commission must continue to use temporary or interim mechanisms to authorize STV operations. This is not only a time-consuming and inefficient procedure, it also continues a scheme of regulatory uncertainty that may well adversely affect the development of STV. In this latter regard, it is important to recognize that our concern is not with prescribing particular signal quality standards themselves. Rather, our concern is focused on the ambivalence of our existing regulatory approach, where STV operators are held by rule to specific signal quality criteria, but uniformly are permitted by waiver to deviate from those criteria. It is this administrative "double standard" that prompts our action, not any inclination to dictate particular signal quality requirements.[8]

9. Unlike technical standards governing the interference potential of STV operations, which we will continue to prescribe, we do not believe STV signal quality criteria should be mandated by the Commission. Accordingly, we will permit all STV licensees to operate their stations at variance with conventional television signal quality standards. Several considerations motivate our decision. First, based on the data available to us we are unable to determine whether STV systems can be modified to comply with all television reception standards or, for that matter, whether such compliance can possibly occur in the near future. Second, even if compliance can be achieved, we believe it inadvisable. Meeting all present television reception criteria could cause an increase in subscriber costs which in turn could cause a decrease in the number of subscriptions. In the alternative, an increase in costs could result in subscribers paying

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unlike the conventional television home, has a custom antenna installation. It asserts that this customization of reception may compensate for the variations from television standards.

[8] Indeed, as the discussion which follows demonstrates, we do not believe it appropriate to mandate signal quality criteria in the STV area.

for an undesired service. In other words, the subscriber might prefer to receive a less than perfect signal rather than face an increase in the cost of his subscription service. If a subscriber is dissatisfied with his television reception, he probably will discontinue his subscription. This is especially so in view of the many present and future competitive pay television services available to the consumer.[9] In short, we believe the marketplace can more effectively govern this STV reception matter. We also note that relaxing the reception criteria for STV broadcasts reduces compliance costs for potential entrants which in turn stimulates entry into the STV industry. This benefits not only businessmen but consumers who desire a pay broadcast product.

10. Finally, because we do not believe that compliance with all TV reception criteria is advisable, the option of establishing goals or a timetable for such compliance is rejected. Further, since the reasons for relaxing reception standards with regard to scrambled broadcasts are as valid for new as existing STV facilities, we find no reason to draw a distinction based on the date of initiation of service. Therefore, we will permit all STV stations, new and old, to operate with signal quality standards no more stringent than the technical systems given advance approval by the Commission to date.

Applications for STV Authorization

11. *Background.* In 1968, the Commission provided that an STV authorization might be issued only to an entity that already is either the licensee of a commercial television broadcast station or the holder of a construction permit for a new commercial television broadcast station.[10] A year later, in the *Fifth Report and Order* in Docket No. 11279, the Commission prescribed the manner in which applications for STV authorization should be filed, as well as their content.[11] However, no STV application form as such was adopted. Instead, applicants must ascertain the appropriate elements of an STV application from a number of paragraphs in the 1969 *Report*. Generally, applicants must submit a detailed description of the proposed STV operation, as well as extensive programming and financial information.

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[9] STV, Cable Television and Multipoint Distribution Services, videocassettes and videodiscs currently offer consumers a pay television product. Further, Direct Broadcast Satellite will be offering pay television later in the decade.

[10] *See Fourth Report and Order*, 15 F.C.C. 2d 466 (1968), and Sections 73.642(a)(1), (2) and (3) of the Commission's Rules. In authorizing a low power television service in 1982, the Commission specifically allowed low power licensees to conduct subscription operations as well. However, unlike conventional commercial television licensees or permittees, low power licensees may engage in subscription broadcasting without obtaining a separate authorization to do so. *See Report and Order* in BC Docket No. 78-253, 47 Fed. Reg. 21468, published May 18, 1982.

[11] 19 F.C.C. 2d 559 (1969).

12. However, notwithstanding the above initial requirements, essentially all programming limitations and obligations unique to STV have been eliminated in recent years. In view of this substantial deregulation, it appears that the Commission's application requirements for STV authorization no longer may be necessary or appropriate. Accordingly, we will outline each such requirement below and evaluate our current need for the information solicited.

13. *Operational Information.* An STV applicant is required to describe in detail how its proposed STV operation will be conducted. The narrative must include: (a) the methods for disseminating any decoding information needed by subscribers, and for billing and collecting charges, including installation charges, monthly charges, and per-program charges; (b) the terms and conditions under which contracts will be entered into with subscribers; and (c) the approximate number of subscribers it is estimated will be served during the period of authorization.

14. STV applicants also are obligated to state whether a franchise holder, which is a separate business entity from the applicant, is to be involved in the proposed operation and, if so, whether and to what extent the franchise holder and applicant are commonly owned. If a separate entity is a franchise holder, the application must indicate exactly the responsibilities and functions of each party. Additionally, an executed copy of any agreement between franchisor and franchisee must be submitted with the application. Any other arrangements that the applicant has with other parties concerning programming which have been reduced to writing also must be furnished.[12]

15. The Commission has never intervened directly in the financial or contractual relationship between the STV operator and its subscribers, nor do we believe such intervention to be appropriate. Rather, we believe that this is an area clearly best governed by the marketplace. A businessman, in his own interests, will establish subscriber fees and conditions so as to encourage consumers to purchase his service. Regulatory intervention, on the other hand, could harm the public by artificially controlling subscription terms. This could prevent a reduction in subscriber costs by an expanding STV operation seeking a wider subscriber base or cause the failure of new STV ventures by removing the flexibility such enterprises need to achieve financial viability. Given these considerations, we continue to believe that the charges and terms of subscription are matters that should remain unregulated. Therefore, we see no valid regulatory basis for continuing to require STV applicants to submit information concerning the financial or other terms of service to their subscribers.

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[12] *Fifth Report and Order*, 19 F.C.C. 2d 559, 564–65 (1969).

16. Our rules do require, of course, that subscription charges and terms, whatever their nature, be applied uniformly.[13] The information now required of STV operators, however, is simply not suited to ensuring compliance with this requirement because a description of the various terms of service to subscribers would reveal nothing about whether they are consistently applied. Rather, subscriber complaints would appear to be a much more efficient and workable mechanism by which to monitor compliance in this area.

17. Further, we see no reason for requesting data on the estimated number of subscribers to be served. Beyond a purely informational function during the early development of the STV service, this data's only potential use is as a means of comparing competing applications for STV authorization. However, because we have eliminated our former "one to a community" and "complement of four" requirements[14], such comparative situations no longer arise. Accordingly, estimated subscribership information serves no current purpose and will therefore no longer be required.[15]

18. We also conclude that STV applicants should no longer be required to furnish information concerning the existence and nature of franchise agreements with other parties or to supply copies of such agreements to the Commission in the first instance. At the time these application requirements were imposed, the Commission extensively regulated STV. Information concerning franchise arrangements, which often played an important role in providing STV service, was thought necessary to monitor the success of and compliance with the then existing regulatory scheme. This is no longer true in light of our comprehensive deregulation of STV. Indeed, under our existing regulatory approach, the only potential use for this information relates to our continuing concern that licensees not enter arrangements which might abrogate their fundamental duty to retain ultimate control over their facilities and programming. Yet, the broad-ranging franchise information currently filed by STV applicants does not efficiently address this focused concern. In order to determine whether a licensee has impermissibly alienated control of its station, the Commission would be required to review large amounts of material unrelated to this question. Moreover, once the relevant terms of any franchise agreement had been identified, the Commission would likely face the burden of seeking clarification from the parties of ambiguous or unclear

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[13] *See* Section 73.642(f)(2) of the Commission's Rules which by amendment herein will be renumbered Section 73.642(e)(4)(ii). However, subscribers may be divided into reasonable classifications and different terms and conditions may be applied to subscribers in different classifications.

[14] *See* nn.2 and 3, *supra.*

[15] The Commission's general informational needs concerning STV can be met, at a much reduced cost to the Commission and its licensees, by commercial sources or, if necessary, by specific requests for relevant data from STV operators.

provisions before it could ultimately evaluate the effect of the agreement on licensee control.

19. In view of the foregoing difficulties, we believe a more practical approach to this issue is to simply require licensees proposing STV operations to certify compliance with Section 73.642(e)(1)-(3) of the rules. These provisions explicitly preclude licensees from entering into agreements which will hinder their ultimate discretion in selecting and scheduling programming or determining the maximum charges to be made for receipt of such programming. Certification will be given in the notification letter which we elsewhere herein are requiring licensees to file upon commencing STV operations. *See* paragraph 28, *infra*. This approach should satisfy our concern with licensee control. It also should relieve the appreciable burden of review now imposed upon the Commission in connection with franchise agreements and substantially reduce the filing burden on licensees. We note, moreover, that we retain the right to obtain copies of franchises or other agreements should questions of control arise concerning a particular licensee and that the complaint process remains available to bring control issues to our attention.

20. *Programming Information*. As part of the STV application, applicants also must provide the Commission with a variety of programming information. First, in cases where applications for STV authorization are filed by existing stations, but not in connection with a renewal, assignment or transfer, applicants must provide data on the type and quantity of conventional programming proposed for broadcast.[16] Because we have eliminated the requirement that STV licensees air a minimum schedule of conventional programming each week, our original concern for the type and quantity of such programming has been vitiated. Moreover, because we previously have determined that program proposals of STV applicants should not be compared with one another or with conventional programming proposals in mutually exclusive application proceedings, information regarding the airing of non-scrambled programming is of no value in the comparative setting. Therefore, in connection with the commencement of STV operations, we will no longer require licensees to provide information on conventional programming.

21. The second category of required programming data provided by STV applicants concerns the time devoted to airing programs in particular subscription classifications. Specifically, STV applicants are required to indicate what percentage of STV broadcast time per year they propose to devote to each type of STV programming (*e.g.*

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[16] If an STV applicant is simultaneously applying for an STV authorization and a construction permit for a new station or license renewal, conventional programming information must be included in the application for construction permit or the renewal application audit form.

feature films, sports, opera, ballet, theatre, and instructional). STV applicants also must indicate, by type of programming, the amount of time between 8 a.m. and 6 p.m., between 6 p.m. and 11 p.m., and in all other hours, that they plan to devote to STV programming in a typical week.[17] Because, STV proposals are not to be compared with one another in mutually exclusive application proceedings and there are no specific Commission requirements or restrictions as to the type or duration of subscription programming, this detailed information serves no regulatory purpose. It is an unnecessary burden on broadcasters and the Commission. Consequently, programming data on scrambled broadcasts will no longer be required.

22. *Financial Information*. Under the mandate of the *Fifth Report*, both the applicant and the franchise holder, whether or not commonly owned, must make extensive financial showings, including balance sheets dated not more than 90 days prior to the date of application, demonstrating that the STV facility can be constructed and operations continued for a period of one year after construction.[18] This is the application of the *Ultravision* test to STV operations.[19] Specifically, this case required a broadcast station applicant to demonstrate its financial ability to meet construction costs and expenses for *one year* without reliance upon advertising or other revenue. This test has been relaxed for conventional facilities, however, with a broadcast applicant now being required only to certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and to operate for *three months* without revenue.[20] Documentation supporting the certification of financial qualifications need not be submitted to the Commission but must be available to the Commission upon request.[21]

23. Although the *Ultravision* test has been relaxed for conventional broadcast applicants, it has not been for STV applicants. All those seeking to conduct STV operations must furnish the Commission with detailed financial information. Specifically, STV applicants must provide an estimate of the costs of making the installation of STV transmitting facilities. This estimate must include costs of labor, supervision, materials, supplies, freight and miscellaneous items. It also must contain a separate estimate of costs, incurred up to the time that STV transmitting facilities are ready for service, with respect to items not pertaining to transmission facilities, such as the cost of installing unscrambling devices in subscribers' homes,

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[17] *Fifth Report and Order*, 19 F.C.C. 2d 559, 566 (1969).

[18] *Fifth Report and Order*, 19 F.C.C. 2d 559, 567-69 (1969).

[19] *Ultravision Broadcasting Co. et al.*, 1 F.C.C. 2d 544 (1965), *aff'd. sub nom., WEBR, Inc.* v. *F.C.C.*, 420 F. 2d 158 (1969).

[20] *See Financial Qualifications Standards*, 72 F.C.C. 2d 784 (1979), and *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 F.C.C. 407 (1978).

[21] *See* News Release, Report No. 18032, June 17, 1981.

advertising and promotion, soliciting and any miscellaneous items. This latter estimate must be broken down on a month-by-month basis and must include an opinion on the number of decoder installations to be made per month.

24. The STV application must also contain an estimated cost of operation on a month-by-month basis during the first year after completion of construction of the STV transmission facility. It must include costs of programming, installation of unscrambling devices, advertising and promotion, soliciting, equipment maintenance, utilities, administration, and miscellaneous items. Wages estimated to be paid in each category must be specified as must be any necessary fees, such as contract costs.

25. As can be seen from the above description, the financial data required of STV applicants and franchise holders is extremely detailed. However, requiring this information no longer appears to be necessary or desirable. It has been our experience that station failure rates have not been affected substantially by the *Ultravision* standard, but rather have depended more upon such factors as competition with other pay services, the general state of the economy, or the quality of station management. We also note that the *Ultravision* standard may conflict with Commission policies favoring minority ownership and diversity of ownership because its stringency may inhibit potential minority applicants from seeking broadcast licenses.[22] Furthermore, we believe that the original certification of financial ability necessary for a construction permit for a commercial broadcast television station is more than adequate to financially qualify broadcasters to operate in the scrambled mode. No additional financial statement is needed. If an applicant for a construction permit plans a subscription operation initially, it will take subscription costs and revenues into consideration upon certifying as to its financial capabilities. If a broadcaster operating a conventional station converts to a pay facility which later fails, the station will likely revert to the conventional mode. However, this latter fact does not particularly concern us because the success or failure of an STV operation depends on public acceptance, and the public is well served whether the station operates in a conventional or scrambled mode.

26. For the above reasons, we conclude that the *Ultravision* standard should no longer be applied to STV operations. Therefore, the requirement that STV applicants and franchise holders submit a detailed financial profile of the proposed STV operation will be deleted.

27. *Conclusion*. We conclude that the time-consuming application process for STV authorization serves no useful purpose. Rather,

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[22] This was the basis for relaxing the *Ultravision* test as it applied to conventional broadcasters.

it imposes a burden on the applicant and the Commission, as well as delays service to the public. Therefore, those television broadcasters wishing to operate subscription facilities no longer need to furnish the Commission with the detailed operating, programming and financial information required by the *Fifth Report and Order* in Docket No. 11279.

New Procedure For Commencing STV Operations

28. In view of the foregoing, all that remains of the application requirements imposed on STV licensees is the identification of the STV system to be used and an indication that the system has been approved by the Commission. If the system has not been previously approved by the Commission, information necessary for such approval must be submitted. Specification of STV equipment (encoders and decoders) by both manufacturer and type number is required.[23] Rather than requiring a specific application for STV authorization to provide us with this minimal information, we are devising a simpler procedure. Any licensee of a commercial broadcast station or the holder of a construction permit for a new commercial television broadcast station which desires to commence subscription operations may do so. We only require that a letter entitled "Notice of Commencement of STV Operations" be sent to the Commission within 10 days indicating the date when subscription operations commenced and the fact that the permittee or licensee complies with Sections 73.642(e)(1)-(3) and 73.644(c) of the Commission's Rules.[24] Identification of the make and type of encoding system used must also be included in this Notice.

29. Section 73.644(c), as it appears in Appendix A of this document, specifies the technical requirements broadcasters are to meet upon commencing STV operations. We note that Section 73.644(b) of the Commission's rules will continue to indicate those technical specifications required of STV systems for advance approval by the Commission. In drafting these rules, we have made every effort not to interfere with technical innovation in and development of the STV service.

30. We believe this newly devised procedure will enable STV service to commence with greater alacrity and with less of an administrative burden to the Commission and its licensees. This clearly serves the public interest.[25]

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[23] *Fifth Report and Order*, 19 F.C.C. 2d 559, 570 (1969).

[24] If subscription service is discontinued, the permittee or licensee must so inform the Commission by letter within 10 days of the cessation of STV service.

[25] Because an application for STV authorization is no longer necessary, no STV renewal application is required.

Ultimate Conclusions

31. We believe our actions herein eliminating the STV application process and adopting less stringent technical standards for STV transmissions offer substantial benefits to the public. Significant paperwork burdens and processing delays inherent in the application process have been removed. This should make the provision of STV service less costly, which should, in turn, increase the likelihood of improved and less expensive service to the public. Similarly, permitting STV facilities to operate under less demanding technical standards recognizes the importance of market forces as a means of controlling quality where there is both competition among communications services and a direct economic relationship between the viewer-subscriber and the broadcaster (or his franchisee). This approach avoids unnecessary financial burdens on STV operators which otherwise might increase the cost to subscribers of STV service or even preclude the availability of service by discouraging new STV entrants.

32. Although this document concludes the proceeding initiated six years ago to reevaluate the rules, requirements and policies governing the STV service, it does not resolve all questions pertaining to STV operation. In the near future, we expect to begin a new proceeding for the purpose of reexamining the regulatory classification of such pay video services as DBS, MDS, low power television, and teletext as well as STV. We believe a new proceeding will provide a more appropriate means of reviewing this issue because STV will be just one of the many competing pay services to be considered.

Regulatory Flexibility Analysis

I. *Need for and Purpose of Rule*

33. The Commission has concluded that the application requirements imposed on those entities seeking to operate STV facilities burden both broadcasters and the Commission while serving no present purpose. The proposed elimination of the application requirements will enable STV service to commence with greater alacrity.

34. We also have concluded that STV licensees should be permitted to operate their stations at variance with television technical reception standards since the marketplace can satisfactorily govern this matter. This action may also stimulate entry into the STV industry by reducing compliance costs for potential entrants.

II. *Summary of issues raised by public comment in response to the intial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues raised:*

35. Since the matter regarding application requirements for STV authorization concerns Commission procedure and practice, prior notice of proposed rule making was not necessary.

36. In regard to the technical issue, all those commenting argued that signal quality standards for STV facilities should be no more stringent than those criteria applied to systems already given advance approval by the Commission. This constitutes compliance with present television interference criteria but allows for less stringent compliance with television reception standards.

B. *Assessment:*

37. The Commission concludes that the arguments supporting a relaxation of the stringent television technical standards pertaining to reception of the STV signal are persuasive.

38. We conclude that the marketplace can govern this matter in a satisfactory fashion. If the subscriber is dissatisfied with his reception, he will likely discontinue his subscription. In addition, this action may stimulate entry into the STV industry by reducing compliance costs for potential entrants.

C. *Changes made as a result of such comment:*

39. Responding to comments, we will now apply less stringent reception criteria to STV systems.

III. *Significant alternatives considered and rejected.*

40. In addition to allowing all STV stations to be at variance with receiver standards, the *Further Notice* proposed establishing goals and timetables for compliance with all technical standards or grandfathering existing STV stations but requiring all STV stations entering new markets to meet present television technical standards. These alternatives were rejected because the Commission concluded that it was best to let the marketplace govern the matter of reception critieria and any form of compliance with all television technical standards by STV stations would be contrary to that finding.

41. Authority for the action taken herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.[26]

42. Accordingly, IT IS ORDERED, that the Commission's Rules

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[26] The rule amendments being adopted include several conforming editorial revisions, including deletion of reference to the Commission's standing Subscrip-

ARE AMENDED, effective December 23, 1983, as described above and set forth in the attached Appendix A.

43. IT IS FURTHER ORDERED, that the Secretary of the Commission will publish this *Fourth Report and Order* in the FCC Reports.

44. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

45. For further information concerning this proceeding contact Freda Lippert Thyden, Mass Media Bureau, (202) 632–7792 and John Reiser, Mass Media Bureau, (202) 632–9660

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

* Appendix B-may be seen in FCC Dockets Branch, Room # 239.

APPENDIX A

1. Section 0.4 is revised to read as follows:

§ 0.4 Standing committee of Commissioners.

There is one standing committee of Commissioners, the Telecommunications Committee. This committee has delegated authority to act or study and report on certain common carrier matters.

2. Section 0.601 is amended by revising paragraph (a) to read as follows:

§ 0.601 Definitions.

* * * * *

(a) The term "agency" means:

(1) The Commission,

(2) A board of Commissioners (see § 0.212),

(3) The Telecommunications Committee (see § 0.215), and

(4) Any other group of Commissioners hereafter established by the Commission on a continuing or *ad hoc* basis and authorized to act on behalf of the Commission.

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3. Section 1.1111 is amended by removing subparagraph (a)(3) and marking it [Reserved.]

§ 1.1111 Schedule of Fees for Radio Broadcast Services.

(a) * * *

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(3) [Reserved.]

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tion Television Committee, and filing fees for applications requesting authority to conduct STV operations. Part 2, Subpart J is amended to recognize the procedures for obtaining advance approval of STV technical systems.

4. Section 2.1001 is amended by adding new paragraph (k) to read as follows:

§ 2.1001 Changes in type accepted equipment.

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(k) The addition of subscription TV encoding equipment for which the FCC has granted advance approval under the provisions of § 2.1400 in Subpart M and § 73.644(c) of Part 73 to a type accepted transmitter is considered a Class I permissive change described in paragraph (b)(1) of this Section.

5. New Subpart M is added to Title 47, Part 2 of the Code of Federal Regulations to read as follows:

SUBPART M - ADVANCE APPROVAL OF SUBSCRIPTION TV TRANSMISSION SYSTEMS

Advance Approval Procedure

§ 2.1400 Application for Advance Approval under Part 73

(a) An original application for advance approval of a subscription TV (STV) system and one copy thereof must be filed by the party who will be responsible for the conformance of the system with the subscription TV standards specified in Part 73 of the Rules. The application must include information to show that the system conforms to the requirements of § 73.644(b).

(b) Advance approval may be applied for and granted in accordance with and subject to the following conditions and limitations:

(1) A separate request for each different technical system must be made by the applicant in writing.

(2) The applicant must certify that the application was prepared by or under the direction of the applicant and that the facts set forth are true and correct to the best of the applicant's knowledge and belief.

(3) The applicant must identify the technical system by a name or type number and define the system in terms of its technical characteristics; a functional block diagram must be included. In addition, a complete description of the encoded aural and visual baseband and transmitted signals and of the encoding equipment used by the applicant must be supplied. These descriptions must include equipment circuit diagrams and photographs, and diagrams or oscillographs of both baseband and transmitted aural and visual signal waveforms and of the signal basebands and occupied bandwidths. If aural subcarriers are to be used for transmitting aural portion of the subscription program, for decoder control, or for other purposes, a full description and specifications of the multiplex subcarrier signals and all modulation levels must be included.

(4) Preliminary test data must be submitted to show system capability with regard to compliance with the criteria set forth in § 73.644(b).

(5) The applicant must identify the specific requirements of §§ 73.682, § 73.687 and § 73.699 (Figures 6 and 7) from which the transmitted signal will normally deviate.

(6) The applicant must specify the method to be used in determining and maintaining the operating power of the transmitter if the procedures given in § 73.663 cannot be used due to suppression of the synchronizing pulses or for other reasons. If the operating power of the station must be reduced to accomodate the encoded aural or video signal, the operating power limitations must be specified.

(7) The applicant must supply any additional information and test data requested by the FCC, to show to its satisfaction that the criteria given in § 73.644(b) are met.

(8) The information submitted by the applicant may be subject to check by field tests conducted without expense to the FCC or, if deemed necessary, at the laboratory or in the field by FCC personnel. This may include the actual submission of equipment for system testing under the provisions of § 2.945 of Part 2 of the Rules.

(9) No technical system will be deemed approved unless and until the FCC has notified the applicant in writing of the approval. Such notification of approval will be by letter to the applicant.

(10) Approval by the FCC is limited to a determination that the particular technical system (the scheme for encoding and decoding the subscription TV signal) is capable of meeting the criteria given in § 73.644(b).

(11) The FCC will maintain a listing of approved technical systems.

(c) Multichannel sound may be transmitted for stereophonic or bilingual service with encoded subscription programs provided the technical operating specifications for this service are included in the application for advance system approval.

(d) Subscriber decoder devices must comply with any applicable provisions of Subpart H, Part 15 of the FCC Rules for TV interface devices.

(e) No modifications may be made by either the applicant or the user of a system having advance FCC approval that would change any of the operating conditions as submitted in the application for advance approval. Should system modifications be necessary, a new application must be submitted in accordance with the requirements of this Section.

6. Section 73.642 is revised in its entirety to read as follows:

§ 73.642 Subscription TV service.

(a) Subscription TV service may be provided by:

(1) Licensees and permittees of commercial TV broadcast stations, and

(2) Licensees and permittees of low power TV stations.

(b) A licensee or permittee of a commercial TV broadcast or of a low power TV station may begin subscription TV service upon installation of encoding equipment having advance FCC approval. However, the licensee or permittee of a TV broadcast station (not applicable to low power TV stations) must send a letter to the FCC in Washington, D.C., that subscription TV service has commenced within 10 days following commencement of such service. In that letter, to be entitled "Notice of Commencement of STV Operations," the licensee or permittee is to state that it complies with the provisions of §§ 73.642(e)(1)–(3) and 73.644(c) of the FCC's Rules and identify the make and type of encoding system being used. A similar notice must be submitted if the licensee or permittee commences using another type of encoding system. (See § 73.644(h).) A notice must also be submitted to the FCC in Washington, D.C., if encoded subscription TV service is discontinued.

(c) The station proof of system compliance measurement data (see § 73.644(c)) need not be submitted to the FCC, however, the measurement data must be available to the FCC upon request.

(d) The use of the visual vertical blanking interval or an aural subcarrier for transmitting subscriber decoder control code signals during periods of normal non-encoded programming may be used only upon specific FCC authorization. Letter requests to use either the video blanking intervals or aural subcarriers during periods of non-subscription programming are to be sent to the FCC in Washington, D.C.

(e) A licensee or permittee of a commercial TV broadcast or low power TV station may not transmit a subscription service if it has a contract, arrangement, or understanding, expressed or implied, that:

(1) Prevents or hinders it from rejecting or refusing any subscription TV broadcast program that it reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest; or substituting a subscription or conventional program that, in its opinion, is of greater local or national importance; or

(2) Delegates to any other person the right to schedule the hours of transmission of subscription programs. However, this rule does not prevent a licensee or permittee from entering into an agreement or arrangement whereby it agrees to schedule a specific subscription TV broadcast program at a specific time or to schedule a specific number of hours of subscription programs during the broadcast day (or segments thereof) or week; or

(3) Deprives it of the right of ultimate decision concerning the maximum amount of any subscription program charge or fee.

(4) Has provisions that do not comply with the following policies of the FCC:

(i) Unless a satifactory signal is unavailable at the location where service is desired, subscription TV service must be provided to all persons desiring it within the Grade A contour of the station broadcasting subscription programs. Geographic or other reasonable patterns of installation for new subscription services is permitted and, for good cause, service may be terminated.

(ii) Charges, terms and conditions of service to subscribers must be applied uniformly. However, subscribers may be divided into reasonable classifications approved by the FCC, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications. Further, for good cause, within such classifications, deposits may be required from some subscribers and not of others; and, also for good cause, if a subscription system generally uses a credit-type decoder, cash operated decoders may be installed for some subscribers.

7. Section 73.643 is revised to read as follows:

§ 73.643 Subscription TV operating requirements.

The non-technical rules and policies applicable to regular TV broadcast stations are applicable to subscription TV operations, except where specifically exempted in the provisions of those rules and policies.

8. Section 73.644 is revised in its entirety to read as follows:

§ 73.644 Subscription TV transmission systems.

(a) Licensees and permittees of commercial TV broadcast and low power TV stations may conduct subscription operations only by using an encoding system that has been approved in advance by the FCC. Such advance approval may be applied for and granted in accordance with the procedures given in Subpart M Part 2 of the Rules.

(b) The criteria for advance approval of subscription TV transmitting systems by the FCC are as follows:

(1) Spectral energy in the transmitted signal must not exceed the limitations given in § 73.687(i).

(2) No increase in width of the television broadcast channel (6 MHz.) is permitted.

(3) The technical system must enable stations to transmit encoded subscription TV programs without increasing the RMS output power from either the video or audio

transmitters over that required to transmit the same program material using normal transmission standards.

(4) Modification of a type accepted TV broadcast or low power TV transmitter for encoded transmissions must not render transmitter incapable of operating in accordance with the operating specifications upon which type acceptance was granted. (See § 2.1001(b)(k))

(5) Interference to reception of conventional television either of co-channel or adjacent channel stations must not increase over that resulting from the transmission of programming with normal transmission standards.

(6) Subscriber decoder devices must meet the provisions, where required, of Subpart H of Part 15 of the FCC Rules for TV Interface Devices.

(c) Prior to commencing the transmission of encoded subscription programming, the licensee or permittee of a TV broadcast or low power TV station must perform such tests and measurements to determine that the transmitted encoded signal conforms to the radiated radio frequency and demodulated baseband and waveforms, transmitter operating power determination, and the occupied bandwidth limitations specified in the application for advance FCC approval of the system being used. A copy of the measurement data is to be maintained in the station files and made available to the FCC upon request.

(d) The licensee of a station transmitting an encoded subscription service must have at the transmitter control point the technical specifications for the system being used of both the aural and visual baseband signals and the transmitted radio frequency signals, and have the necessary measuring and monitoring equipment, including transmitter output power measuring equipment, to determine that the transmissions conform to the advance approval specifications on file with the FCC. Full operating specifications for the system must be available to representatives of the FCC upon request.

(e) The operating power of the transmitters during encoded operations must be determined and maintained according to the procedures given in the application for advance approval.

(f) A station using an encoding system in accordance with the specifications filed with the application for advance approval is deemed to be exempted from those technical regulations of this Subpart and Subpart H to the extent they are specifically detailed in the application.

(g) No protection from interference of any kind will be afforded to reception of encoded subscription programming over that afforded reception of non-encoded signals.

(h) A licensee or permittee may make no modifications on a subscription encoding system that would alter the characteristics of the transmitted aural or visual signal from those specified in the application for advance approval. A licensee or permittee of a station replacing its encoding system must perform the measurements required by paragraph (c) of this Section. A TV broadcast station licensee or permittee must also send a letter advising the FCC of the new system being used as required by § 73.642(b).

(i) The station licensee is fully responsible for all technical operations of the station during transmissions of encoded subscription programming, regardless of the supplier of the encoding equipment or subscription program service.

Note: Stations transmitting encoded subscription programming prior to October 1, 1983, must comply with all technical and operating requirements of this Section no later than April 1, 1984. Stations not having the information to comply with this Section must obtain such information from the manufacturer of the encoding system being used, and if necessary, by measurements of the station's transmission system.

(j) Upon request by an authorized representative of the FCC, the licensee of a TV station transmitting encoded programming must make available a receiving decoder to the Commission to carry out its regulatory responsibilities.

9. Section 73.682 is amended by revising the headnote and paragraph (c) to read as follows:

§ 73.682 TV transmission standards.

* * * * *

(c) *Subscription TV technical systems.* The FCC may specify, as part of the advance approval of the technical system for transmitting encoded subscription programming, deviations from the power determination procedures, operating power levels, aural or video baseband signals, modulation levels or other characteristics of the transmitted signal as otherwise specified in this Subpart. Any decision to approve such operating deviations shall be solely at the discretion of the FCC.

10. Section 73.687 is amended by removing paragraph (k).

11. Section 73.1560 is amended by revising paragraph (c) to read as follows:

§ 73.1560 Operating power tolerance.

* * * * *

(c) *TV stations.* Except as provided in paragraph (d) of this Section, the aural and visual transmitter output power of a TV station, as determined by the procedures specified in § 73.663 must be maintained as near as practicable to the authorized transmitter output power and may not be less than 80% nor more than 110% of the authorized power. If a station is engaged in transmitting encoded subscription programming under the provisions of §§ 73.641–73.644, the operating power must be maintained in accordance with the procedures and within such range as may be specifically given in the application for system advance approval.

Note: The permissible operating power limits for TV audio transmitters is being considered in BC Docket No. 83–117.

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12. Section 73.1570 is amended by revising subparagraph (b)(3) to read as follows:

§ 73.1570 Modulation levels: AM, FM, and TV aural.

* * * * *

(b) * * *

* * * * *

(3) *TV stations.* Except as provided in (i) and (ii) below the total modulation of the aural carrier must not exceed 100% on peaks of frequent recurrence.

(i) Stations transmitting multiplex subcarrier signals on the aural carrier for telemetry or other authorized services (see § 73.682(a)(23)) must limit the modulation of the main carrier by the subcarrier(s) to not more than 10%. The total modulation may not exceed 100% unless specifically authorized by the FCC.

(ii) Stations transmitting aural subcarriers as part of encoded subscription programs under the provisions of §§ 73.641–73.644 may modulate the aural carrier in accordance with the specifications stated in the application for advance FCC approval.

* * * * *

13. Section 73.1690 is amended by adding new subparagraph (e)(7) to read as follows:

§ 73.1690 Modification of transmission systems.

* * * * *

(e) * * *

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(7) Installation of subscription TV program encoding equipment having advance FCC approval. See §§ 2.1001(k) in Part 2 and 73.644(c) in this Part of the Rules.

Channel Loading
Frequency Allocation
Private Land Mobile Radio Service

Memorandum Opinion and Order adopted regarding petitions for reconsideration and clarification of *Second Report and Order*. Private land mobile spectrum in 800 MHz released and rules adopted to govern operation of private land radio systems.
–Amendment of Part 90
PR Docket No. 79–191

FCC 83–474

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 90 of the Commission's Rules to release spectrum in the 806–821/851–866 MHz bands and to adopt rules and regulations which govern their use.	PR Docket No. 79–191 RM-3380
Amendment of Part 90 of the Commission's Rules to facilitate authorization of wide-area mobile radio communications systems.	PR Docket No. 79–334 RM-3691
An Inquiry concerning the multiple licensing of 800 MHz radio systems ("community repeaters").	PR Docket No. 79–107
Amendment of Section 90.385(c) of the Commission's Rules to allow transmission of non-voice signals at 800 MHz.[1]	PR Docket No. 81–703

MEMORANDUM OPINION AND ORDER
(PROCEEDING TERMINATED)

(Adopted: October 19, 1983 Released: November 1, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

Background

1. On July 22, 1982, the Commission adopted a *Second Report*

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[1] The titles of the various proceedings that have been consolidated into this proceeding have been shortened.

and Order in this proceeding which released the remaining 250 private land mobile channels in the 806–821 MHz and 851–866 MHz bands[2], and established new rules to govern private land mobile radio operations on these channels. This proceeding ended a process that began in 1970 for allocating spectrum and adopting a regulatory structure to govern private land mobile radio operations at 800 MHz. The *Second Report and Order* established uniform rules for future operation in these bands, as well as certain interim rules to cover grandfathered systems authorized under previous rules. The *Second Report and Order* also consolidated four related dockets which dealt with 800 MHz private land mobile radio.

2. Stated broadly, the *Second Report and Order*: (1) apportioned the remaining 800 MHz private land mobile radio spectrum among four user categories established by eligibility affinity;[3] (2) opened channels to both trunked and conventional technology;[4] (3) established uniform loading standards for all conventional systems and for all trunked systems;[5] (4) increased the number of mobile stations required to assure channel exclusivity; (5) reduced the time within which certain channel loading benchmarks must be reached in areas where there are waiting lists for frequencies; (6) required frequency selection by applicants, except in the case of Specialized Mobile Radio System (SMRS) licensees;[6] (7) eliminated a number of technical restrictions which reduced licensees' operational flexibility; and (8) removed the restriction on manufacturers' entry into the SMRS marketplace as licensees of systems.

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[2] Six hundred channels were made available for private land mobile use in the *Second Report and Order* in Docket No. 18262. Three hundred channels were released in 1974 and another fifty in 1978. *See generally, First Report and Order and Second Notice of Inquiry*, Docket No. 18262, 35 Fed. Reg. 8644 (June 4, 1970); *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974), *reconsidered, Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975); *Order*, FCC 78–854, (1978) on reconsideration: *NARUC* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

[3] Public Safety/Special Emergency Radio Services; Industrial/Land Transportation Radio Services; Business Radio Service; SMRS private carrier licensees.

[4] A trunked system is one in which two or more channels are linked with a computer controller in order to assign the first available channel to a user. A conventional system operates on one or more channels, but unlike a trunked system, each user must manually search for a vacant channel.

[5] Loading standard describes the number of mobile transmitting stations which must be placed in operation on a given frequency pair (i.e. "channel") or group of frequencies.

[6] An SMRS or specialized mobile radio system is a private carrier system in which the licensee of the base station transmitter is authorized by the Commission to operate as a commercial provider of communications service to persons eligible under Part 90 of the Commission's rules. See *NARUC* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992(1976). *See also* Communications Amendments Act of 1982, § 120, P.L. 97–259, 96 STAT 1087, September 13, 1982, codified at 47 U.S.C. 332.

Reconsideration

3. Several parties have requested either reconsideration and reversal, or clarification of various aspects of the *Second Report and Order*.[7] Broadly stated, the issues which they ask us again to consider include: the appropriate number of transmitters necessary to achieve channel loading in any given locale or radio service; our authority to authorize one-way paging on 800 MHz two-way systems; whether Business Radio Service eligibles should also be allowed extended system implementation schedules when certain predefined conditions are met; the status of remote or satellite stations in wide-area radio systems operated by public service agencies in situations in which the geographic area needed to be covered exceeds the protected area which the rules provide; the comparative criteria which the Commission will apply in cases in which applications are received for more frequencies than are available; the authorization of trunked SMRS licenses to RF equipment manufacturers; the termination of PR Docket 79–107; and the application processing procedures applicable to trunked SMR systems.

Summary

4. By this *Memorandum Opinion and Order* the Commission clarifies and to some extent modifies its channel loading standards for trunked private land mobile 800 MHz systems; affirms the permissibility of paging on 800 MHz channels where it will not impair two way operations; allows extended radio system implementation schedules in the Business Radio Service; clarifies the comparative criteria to be applied when more applications are received than can be accommodated on available frequencies in the SMRS category; affirms the removal of entry restrictions on radio equipment manufacturers in the offering of SMRS service; affirms its decision to terminate the proceeding looking into multiple licensing at 800 MHz (PR Docket 79–107); and affirms trunked SMRS application processing procedures employed by the Commission.

Loading and Loading Related Issues

A. Discussion

5. Two petitioners, LMCC and Motorola, request we reconsider several of our decisions regarding channel loading and measuring the use of the 800 MHz channels. LMCC addresses this matter in the

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[7] The petitioners are (1) the Associated Public-Safety Communications Officers (APCO); (2) the E.F. Johnson Company (Johnson); (3) the Land Mobile Communications Council (LMCC); (4) Motorola, Inc. (Motorola); (5) the National Association of Business and Educational Radio, Inc. (NABER); and (6) the Telocator Network of America (Telocator). In addition, the National Mobile Radio Association (NMRA) filed an appeal of the proceeding in PR Docket 79–191 in the United States Court of Appeals for the District of Columbia Circuit, No. 82–2095, September 18, 1982.

context of the status to be afforded satellite or remote base stations operating as part of wide-area trunked systems. It requests that these satellite or remote base stations be given primary status, rather than the secondary status currently prescribed in the rules. LMCC argues that the critical nature of communications on wide-area systems makes the application of secondary status to any portion of the system "unacceptable and not in the public interest," in that these types of systems generally have public service responsibilities.[8]

6. Motorola raised several other issues related to loading. First, it supports the position taken by LMCC on the subject of wide area systems for public service agencies. Second, Motorola suggests that the 70 mobiles per channel loading standard for conventional systems is too high, and that, as a general proposition, the loading requirements in major market areas should be different than those for smaller market areas.[9] Motorola believes that such distinctions should be stated explicitly in the rules. Motorola is also concerned that the Commission may permit the use of "air-time" instead of mobile station transmitter counts as a measure of channel occupancy, which would encourage private radio system licensees to interconnect their radio systems with telephone service to originate and receive calls in their mobile units. Motorola suggests that the consequences of permitting "air-time" to be used as a measure of channel occupancy would be to encourage lengthier conversations over the radio system by allowing licensees to substitute channel

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[8] A wide area system is a system which seeks to protect a larger geographic area than the circle with a 20 mile radius generally contemplated by the rules. An example would be a police department or power company whose obligations include serving outlying areas. The wide area system typically can operate in two ways: (1) the satellite base stations can operate on different frequencies than the primary or central base station; or (2) the satellite station can operate on some or all of the same frequencies assigned to the central base station. At issue before us is the narrow question of the status of these satellite base stations when licensees of trunked systems seek to "re-use" at secondary locations the same channels used at the primary base station. Since primary base station frequencies are generally assigned for re-use at 70 mile intervals, if a wide area licensee's satellite stations have primary status, then it necessitates spacing more than 70 miles from the primary site before another licensee can re-use the frequencies. 47 CFR § 90.366(h) now provides: "Wide area systems may be authorized . . .upon an appropriate showing of need. If the licensee wishes to operate remote or satellite stations on some or all of its authorized trunked frequencies, these systems will be authorized only on a secondary, non-interference basis to co-channel licensees."

[9] In the *Second Report and Order* a uniform conventional channel loading standard of 70 mobile station transmitters per channel was established on a nationwide basis, with no differential based on population density. However, enforcement of this loading standard for purposes of retaining channel exclusivity only is triggered when no spectrum is available for assignment. Cf. 47 CFR § 90.633(a) which provides: "Conventional systems of communication will be authorized on the basis of a minimum loading criteria of 70 mobile stations for each channel authorized."

occupancy for loading and thus to reduce the number of mobile stations they must place on these frequencies. This, Motorola believes, would diminish the efficient use of this spectrum. Motorola requests we affirm that we are not contemplating air-time as the measure of channel occupancy.

B. Decision

Wide Area Systems

7. The Commission has considered the various points raised by the petitioners regarding loading. With regard to the subject of wide area systems for public safety and public utility licensees, we conclude there is merit to allowing satellite stations to have primary status. We do not reach this conclusion easily, however, because in some respects it will diminish our ability to maximize the number of licensees who can use this spectrum. On the other hand, we must assure that communications systems which promote public safety can be implemented in ways which, in fact, permit them to be useful and serve the entire population for which they have responsibility. As is stated in the Conference Report accompanying the Communications Amendments Act of 1982, "The Commission should be ever vigilant to promote the private land mobile spectrum needs of police departments and other public agencies which need to use such radio services to fulfill adequately their obligations to protect the American public."[10] After weighing this matter, we are amending our rules to grant, on a "first-in" basis, primary status to satellite stations operating in wide area trunked 800 MHz systems authorized to public safety agencies and public utility companies. This action, we believe, recognizes the possible needs of these licensees to serve larger geographic areas than can be reached by a single central base station, as well as their need to have the certainty of knowing, for planning purposes, that all the stations which comprise the system will be able to operate with primary status.[11]

Conventional System Loading

8. Turning to Motorola's requests, we have had a good deal of experience in the years since we first authorized conventional 800 MHz systems in various approaches to conventional system loading. Previous rules varied both by radio service and geographic area so

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[10] Conference Report No. 97–765, 97th Cong., 2d Sess., August 18, 1982, p.52, reprinted in 1982 U.S. Code Cong. & Ad. News 2261, 2296.

[11] Notwithstanding our decision to accord the satellite stations in wide area trunked systems of public service agencies primary status when they reuse frequencies, we are not requiring that the satellite stations be treated as primary stations for mobile loading purposes. Thus, we will continue to count the total number of base station frequencies and the total number of mobile stations in a given system to determine if our loading standards have been met. Cf. 47 CFR § 90.366(h) and 47 CFR § 90.631(e).

that there were different loading levels between, for example, an urban police department and a rural police department, as well as between an urban police department and other urban industrial users. There were also different loading levels for eligibles within 75 miles of the top 25 urban markets and for those beyond. There were other variations also defined by the number of licensees authorized for a channel. In our *Second Report and Order*, we considered the complexity of these various rules, as well as the entire issue of appropriate loading levels for various types of conventional systems. We concluded that in the Business Radio Service the loading should come down, in the public safety services it should go up, and that the level required of industrial users was about right, on an average, for all conventional system licensees. We thus adopted a uniform conventional channel loading standard of 70 mobile transmitters per channel, which was supported by the Land Mobile Communications Council speaking for the preponderance of the land mobile licensees.

9. Motorola asks us to reconsider this decision and lower the number of mobile station transmitters which will secure a conventional channel for a licensee(s) on an exclusive basis.[12] It argues the quality of service is too low (i.e. the time which licensees must wait for an unused channel is too long) if 70 mobiles is the minimum level for conventional channel exclusivity. We have reconsidered this point and find nothing new in Motorola's submission which persuades us to change our earlier decision. We recognize that there is no perfect figure for conventional channel loading, and that the particular circumstances surrounding the operation of individual stations could require an optimal loading level higher or lower than the figure we have chosen. However, 70 mobile transmitters appears to us to be a reasonable figure which has the general support of the user community and has worked reasonably well from an administrative perspective. We see little benefit to changing it, with the attendant disruption entailed, for yet another figure which is no more precise than the existing one. Motorola, moreover, has not demonstrated that there is a better figure. Rather it only asserts our present figure is too high. In light of the apparent general satisfaction with our existing figure, and the lack of demonstrable evidence that another is superior, we decline to modify our present channel loading figure of 70 mobile stations per conventional channel.

Trunked System Loading

10. In the process of reviewing the loading standards issue in response to Motorola's petition, we have also re-examined the

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[12] 47 CFR § 90.633(b) provides: "A channel will not be assigned to additional licensees when it is loaded to 70 mobile stations. Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment to other licensees. All authorizations for conventional systems are issued subject to this potential channel sharing condition."

trunked system loading standards established in the *Second Report and Order* in this proceeding. Based on this analysis, and our experience in administering the new rules adopted in this proceeding, we are persuaded that some modification in the trunked loading standards is necessary if trunked systems are to flourish at 800 MHz. As is set forth in great detail in our proceeding in Docket No. 18262, *supra* n. 2, one of our major objectives for 800 MHz was the introduction of channel trunking technology. To this end we established rules to allow licensees to build their own communications systems or to avail themselves of the services of private radio communications providers (*i.e.*, the licensees of SMR systems).[13] Unfortunately, our early experience was that applicants, particularly commercial provider applicants, requested far more spectrum than they could put to use in the immediate future. This resulted in there being no spectrum available for new applicants, particularly new SMRS applicants, and no spectrum available in many areas of the country for existing licensees who wanted to expand already operating trunked systems. To remedy this, in our *Second Report and Order* in Docket 79–191, we limited the number of channels SMRS applicants proposing commercial communications service to others could request to five channels at a time. We also adopted rules to facilitate our recovery of channels from licensees who were holding, but not loading, channels. We are mindful, however, that the effect of this approach, particularly in the private carrier area, is to make the operation of ten, fifteen and twenty channel trunked systems more difficult. This is counterproductive to the greatest efficiencies from trunking, which occur in the largest systems. The policy was necessitated, however, by our need to balance a few licensees with unloaded larger trunked systems against a marketplace in which a large number of smaller trunked systems compete in the offering of radio communications service to small businesses and other eligibles. We concluded greater competition in the offering of service was more desirable. We continue to believe this conclusion was correct.[14]

11. Simultaneously with our decision to limit SMRS applicants to five channels at a time, we adopted rules which required trunked licensees to load their channels to specified levels in specified periods of time with mobile transmitters, or face the loss of channels.[15] We

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[13] See Docket No. 18262 and *NARUC* v. *FCC*, *supra*, for the history of the creation of private carrier systems.

[14] Moreover, as the market place settles, we expect that larger trunked systems will come into existence through buy-outs, mergers, etc.

[15] 47 CFR § 90.631(b) provides: "Each applicant for a trunked system shall certify that a minimum of 60 mobiles for each channel authorized will be placed in operation within 3 years of initial license grant, and that a minimum of 80 mobiles for each channel authorized will be placed in operation within 5 years of initial license grant. If at the end of three years or five years a trunked system is

are aware that there is a severe economic penalty paid for failure to meet the channel loading standards for trunked systems because channels are lost when the standards are not met. Thus, system capacity is reduced to the economic detriment of the base station licensee and to the injury of the mobile station licensees operating on the systems in the case of an SMRS. If licensees have made significant strides in loading their channels and have fallen somewhat, but not significantly, short of the required channel loading goal, we think some leeway should be provided. The balance, however, is difficult. On the one hand we desire more efficient radio systems, and the larger the number of channels a trunked system has, the more mobiles it can accommodate *vis-a vis* a conventional system. On the other hand, to allow licensees who have ten, fifteen, and twenty trunked channel assignments to keep the excess over five, when they have not even loaded the five and when other applicants are waiting, does not serve the public interest because the effect of this is to prevent other competitors from coming in to serve the small business user market. *See P&R Temmer*, FCC 83–171 (released May 16, 1983) and *AAT Electronics Corp.*, FCC 83–170 (released May 16, 1983). The measure of channel usage we employ in our rules is the number of transmitters authorized for use on the channels. In counting these transmitters, however, we count only mobile and portable stations, not control stations. But, a control station is an "immobile" mobile station.[16] The control station communicates on the system's channels in precisely the same way a mobile station does. Moreover, the number of control stations licensed to a user is small in proportion to the number of mobiles, in most circumstances, so that the effect of counting control stations as well as mobile stations for purposes of meeting our trunked channel loading standard will be to ease slightly the loading standard. Therefore, we have decided that control stations will be counted to determine the loading level of trunked systems only. This, we envision, should have the benefit of permitting otherwise almost loaded trunked systems to reach the standard through counting their control stations for channel loading purposes. It will thus permit preserving intact the basic five channel grant in circumstances where there has been substantial compliance with our mobile loading rules. Although we recognize that this change will, in effect, reduce the trunked system loading standard in the short run, since we have removed all restrictions as to the number of mobile transmitters which may operate on a trunked system, and since

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not loaded to the prescribed levels and a waiting list exists in the system's geographic area authorization for channels not loaded to 100 mobile stations cancels automatically. All authorizations are subject to this condition."

[16] 47 CFR § 90.7 defines a control station as: "An Operational Fixed Station, the transmissions of which are used to control automatically the emissions or operation of another radio station at a specified location."

there is an economic incentive for SMRS licensees to enhance profits by maximizing system loading, we expect this will not result in lower loading levels for trunked systems in the long run.

12. We are not, however, adopting the same approach for conventional system loading. These systems do not suffer an absolute loss of channels when they fail to meet the loading standards, and we find no reason to modify their loading levels downward by including control stations in their loading count. These systems are not as efficient in the numbers of mobiles they can handle on a given amount of spectrum as trunked systems and they do not, from the Commission's perspective, maximize spectrum use in the way trunked systems do. We believe 70 mobile stations is an appropriate number of mobile stations to operate on a conventional base station channel (See paragraphs 8 and 9 above). Moreover, as noted in our *Second Report and Order*, in some instances we lowered the loading levels for conventional systems. Further reduction in loading levels by the counting of control stations is not warranted and is unnecessary to any regulatory purpose. In the absence of this, we will continue our existing approach for conventional systems loading.

13. In further considering the principles to govern loading of trunked systems, we also have decided to modify two other rules. First, we will allow licensees of existing systems to apply for admission to the waiting list for the 200 trunked channels governed by Subpart M when their systems are 70% loaded. Our present policy requires licensees to be 90% loaded before they apply for additional channels. Many have contended that in light of the waiting time for additional channel authorization, this imposes a long period of poor quality service for their subscribers. They contend, if they could at least get on the waiting list sooner, it would be beneficial. We agree. We caution, however, no channels will be authorized to persons on the waiting lists unless already authorized channels meet our loading requirements. If they have not loaded, applications will be dismissed at the time they reach the top of the list.

14. Second, we are modifying our rules to permit a licensee to obtain additional trunked channels in a market area when its existing system is loaded to 80% of the loading standard of 100 transmitters per channel. We believe that the current requirement that trunked systems be loaded to 90% before additional channels are authorized unnecessarily imposes a reduced service quality on system users. This is especially true as the loading standard is approached on a five channel trunked system since the efficiency of trunked systems increases with the number of channels. Because a trunked system licensee must load its system to 80% of the loading standard in order to retain channel exclusivity, it is reasonable to

authorize additional channels for these systems when the loading standard is satisfied.

Urban/Rural Distinction

15. With regard to the urban/rural loading distinction which Motorola requests, we clearly took cognizance of this matter by adopting rules relating to channel exclusivity which were activated only by the lack of spectrum in a particular geographic area.[17] Thus, there is no penalty attached to a licensee's failure to meet our loading levels nor is there any bar to a licensee being authorized additional channels even though the 70 mobile transmitter per channel standard is not met, until the time arrives when there is no spectrum available for other applicants who seek to implement radio systems. At that point, if a licensee has not loaded a channel to the level of mobile transmitters required by the rules for channel exclusivity (i.e. 70), other licensees will be "loaded on top of the system", that is, other licensees will be authorized radio transmitters on the same channel. Since channel sharing is common in the private land mobile services in the bands below 800 MHz,[18] this is not an uncommon occurrence to the land mobile community and, in most circumstances, works little or no unmanageable harm on licensees. Also, since land mobile spectrum shortages generally occur in urban areas, in most rural areas there is little likelihood that all available spectrum will be exhausted. Therefore our rules do permit, in effect, lower channel loading levels for typical rural users. However, in our estimation, the true test of the need to meet the loading standard is not keyed to locale, but rather to the radio operating environment in the locale. Thus, in rural areas where there is high spectrum demand, we believe the loading levels should be the same as it is in urban areas where there is high spectrum demand. We, therefore, affirm our existing rules and decline to adopt different loading levels based on urban/rural distinctions.

Air Time As a Measure of Channel Occupancy

16. The issue of how the Commission should measure and assure that licensees are making efficient and effective use of the radio frequencies for which they have been authorized is one of the most difficult and recurring questions we have faced throughout this

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[17] At paragraph 86 of our *Second Report and Order* we stated: "This mobile loading minimum will apply in all areas of the country (i.e., there is no distinction between the top 25 urban areas and other locations) and it will apply to all conventional radio systems, regardless of the category of eligibility of the licensee. However, in areas where waiting lists for conventional channels do not develop, a licensee may be assigned additional channels upon an appropriate showing of need even though an already licensed channel is not loaded to 70 mobile units."

[18] See 47 CFR § 90.173.

proceeding. No one disputes that there should be some established measure of efficient and effective spectrum use. There is little or no unanimity, however, on what constitutes such use. As a general proposition, public safety users maintain that a channel is being efficiently and effectively used when it is immediately available on a clear channel basis when an emergency arises. Others maintain that a channel is efficiently and effectively used when it is occupied by a signal a large percentage of the time. Still others contend not only that the channel must be occupied, but that it must be occupied by a technology which maximizes the number of mobile stations which can operate on the channel. A variety of other tests and refinements have also been considered. In 1974, we adopted as the test the number of mobile transmitters which are authorized on a channel. We then required that applicants who sought channels on an exclusive basis would have to load their channels with a specified number of mobile transmitters in a specified period of time or they would forfeit channels.

17. Air time, or the establishment of a standard which would permit licensees to demonstrate through the measurement of actual use of the channels that the spectrum was being used efficiently independent of the number of transmitters authorized on a channel, is another possible alternative measure of spectrum utilization. However, if air time were to be allowed as a substitute for station loading as the measure of efficient spectrum use in these services at 800 MHz, it would require, as a prerequisite, the development of standards for computing what measure(s) of air time would constitute "efficient use". Moreover, while some commentors supported such an approach, there was little or no serious discussion of whether there should be uniform standards, or standards by various services, nor what these standards should be and how they might be developed. Lacking data on most of these points, we declined in our *Second Report and Order* either to adopt an air time approach or to embark on further rule making in this regard. Instead, we decided to retain our existing approach which we felt was just as valid a measure of efficient spectrum use, and which was much easier to administer. We reiterate that view on reconsideration.[19]

Paging/Technical Flexibility

A. Discussion

18. Three petitioners, Motorola, NABER, and Telocator request reconsideration of the Commission's decision to allow the 800 MHz private land mobile two-way channels to be used for paging. Both

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[19] Motorola requested that the Commission affirm its authority to cancel licenses automatically in the event systems are not constructed or loaded as prescribed in the rules. This matter has already been addressed in *P&R Temmer* and *AAT Electronics Corp., supra.*

Motorola and NABER request that we expand our approach to extend eligibility to transmit pages to multiple licensed systems commonly referred to as "community repeaters."[20] Telocator, on the other hand, argues that the issue of paging was outside the scope of the *Further Notice of Proposed Rule Making* in this proceeding.[21] Therefore, Telocator suggests that by changing the rules to permit paging, the Commission has violated the Administrative Procedure Act.

19. Motorola, in its petition, argues that the option to use paging should be extended to all types of shared systems, and not restricted to SMR systems and licensees of exclusive channels. The Motorola petition goes on to point out that licensees may have a legitimate need to page as well as engage in two-way communication, and should not be forced to employ separate systems for each type of communication. Paging, Motorola asserts, should be permitted on shared channels on a co-equal basis to two-way communication. Motorola, while preferring unrestricted paging authorization, concedes that reasons may exist to require prior consent of all licensees of a multiple licensed transmitter prior to allowing paging.

20. NABER argues that the Commission did not explain why a distinction was drawn between paging on an SMRS system and paging on a community repeater. NABER would extend paging eligibility to licensees of community repeaters on a secondary basis to two-way communication. NABER suggests that the secondary status would make paging use compatible with the primary two-way use.

21. Telocator's petition argues that the Commission failed to provide "fair and adequate notice" that it was considering expansion of paging privileges from licensees of exclusive channels to SMR systems and, therefore, violated the rule making procedures required by the Administrative Procedure Act. Telocator suggests that expansion of eligibility to page in these bands constituted a major transformation of permissible transmission modes, and should have been addressed explicitly in the *Further Notice of Proposed Rule Making* in this proceeding.

B. Decision

22. The Telocator petition argues that modification of our 800 MHz rules to allow paging on SMR systems constitutes a major change in our rules, and therefore is subject to the notice and comment procedures established in the Administrative Procedure

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[20] For a discussion of multiple licensing see *Report and Order*, Docket No. 18921, 47 Fed. Reg. 19527 (May 5, 1982); *on reconsideration, Memorandum Opinion and Order*, Docket No. 18921, 48 Fed. Reg. 26617 (June 9, 1983).

[21] *Further Notice of Proposed Rule Making*, PR Docket No. 79-191, 46 Fed. Reg. 37927 (July 23, 1981).

Act. The Commission agrees that this change is subject to notice and comment procedures, and we are satisfied that the requirements of the APA have been fully satisfied. In paragraph 73 of the *Further Notice of Proposed Rule Making* in Docket 79–191, we stated specifically that "we believe it would be advantageous to allow flexibility in choosing the type of emission mode to be used and the amount of bandwidth to be occupied." In paragraph 78 of the same document we indicated our intention as follows: "We propose to eliminate all restrictions on non-voice and other specialized operations." This increased technical flexibility was proposed in Docket 79–191 for channels assigned for the exclusive use of a single licensee, SMR systems, and shared systems in which all licensees agree to the intended use of the channels. Since paging is clearly a non-voice or specialized operation, there is no question that adequate notice was provided in this proceeding of our intention to permit any type of emission mode or specialized operation which the licensee(s) found feasible. We proposed this capability extend to single licensee systems, SMR systems, and shared systems in which all licensees agree to any particular use of the channel, including paging. We therefore reject Telocator's assertion that we have not complied with the requirements of the APA, and conclude that our stated intention to eliminate all restrictions on non-voice and other specialized operations on these frequencies encompassed paging, and satisfied the prior notice and comment requirements of the APA.

23. Turning now to the arguments made by Motorola and NABER to extend paging to shared channels, we find them persuasive. Moreover, NABER's request that we accord such operations secondary status by requiring the prior consent of all those licensed for the channel allays our concerns about interference. Therefore, we are relaxing these restrictions on technical flexibility imposed in the *Second Report and Order*, and are extending full technical flexibility, including the option for paging, to shared systems in which all licensees agree to the intended use of the channel. This action, we believe, serves the public interest by maximizing the use which licensees can make of the spectrum authorized to them, consistent with our regulatory objectives.

Extended Implementation

A. Discussion

24. Three petitioners, LMCC, Motorola and NABER, request that the Commission reconsider the eligibility requirements for extended implementation schedules.[22] The rules adopted in the *Second Report and Order* allow extended implementation schedules of up to three years only in the Public Safety/Special Emergency and

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[22] 47 CFR § 90.366(g) and § 90.629.

Industrial/Land Transportation pools. No such provision was made for eligibles in the Business Radio Service. All three petitioners argue that eligibles in the Business Radio Service also should have the flexibility to elect an extended implementation schedule, since they too face similar problems in implementing large complex communications systems.

25. LMCC proposes that the rules be modified to indicate that although extended implementation schedules are not normally available in the Business Radio Service, it would be allowed in circumstances in which the criteria which apply in the Public Safety/Special Emergency and Industrial/Land Transportation pools are met. Motorola proposes two alternative changes: (1) eliminate the exclusion of Business Radio Service eligibles, but require a more stringent showing than is required in the other two service pools which permit extended implementation; or (2) retain the exclusion, but acknowledge that legitimate needs for extended implementation may exist within the Business category and that these needs may be accommodated through the waiver process. NABER supports the rule change as proposed by LMCC. However, NABER requests that Business category applicants for extended implementation schedules be required to demonstrate that they are not eligible in the Industrial/Land Transportation category.

B. Decision

26. At the time the "slow growth" rules were adopted in this proceeding, it was not apparent that applicants in the Business Radio Service would require the flexibility to elect extended implementation schedules. Moreover, during the comment period no one asked for slow growth capability for Business Radio Service systems. Consequently, when we adopted our *Second Report and Order*, this option was not made available to eligibles in the Business Radio Service. However, we are persuaded by the three petitioners on this issue that the current rules may be unduly restrictive with respect to applicants whose sole eligibility is in the Business Radio Service. They indicate that some applicants may have requirements for extended implementation periods and that the rules should be modified to meet those requirements. Furthermore, subsequent to the adoption of the *Second Report and Order* in this proceeding, a Business Radio Service eligible, IBM, sought and obtained a waiver of the current restriction against extended implementation schedules in the Business category.[23]

27. Therefore, in further considering this point, we are modifying the rules to permit extended implementation schedules by eligibles in the Business Radio Service. Business eligibles will be subject to the same showings as eligibles in the Public Safety/Special

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[23] *Order*, FCC 83–104, adopted March 10, 1983.

Emergency and Industrial/Land Transportation categories. We are also adopting the restriction suggested by NABER which would require applicants for extended implementation schedules in the Business category to demonstrate either that they are not eligible in the Industrial/Land Transportation category, or that no frequencies are available in the Industrial/Land Transportation category. This is equitable, we believe, in view of the fact that Business Radio Service eligibles often have no options but the Business category frequencies, while Industrial/Land Transportation Radio Service eligibles may have several options.

Comparative Criteria

A. Discussion

28. Three petitioners, APCO, Motorola, and NABER request that the comparative criteria discussed in paragraph 208 of the *Second Report and Order* in this proceeding be modified.[24]

29. APCO suggests that the Communications Amendments Act of 1982 compels the Commission to establish criteria which would take into consideration the degree to which a particular proposed radio system was necessary for the safety of life and property. APCO requests that the comparative criteria be expanded to encompass public safety considerations, or that eligibility in the Special Emergency Radio Services be restricted to governmental entities.

30. Motorola makes two suggestions regarding the comparative criteria. First, it requests that the Commission specifically identify the types of evidence sought to support the third criterion. Second, Motorola would add a criterion which addresses the quality of service. It proposes, as a suggestion, that a dispatch-only service be preferred over a competing service which is interconnected with the telephone network.

31. NABER suggests that the criteria are too general to narrow the number of competing applications. In its petition, NABER indicates that it is its impression that the criteria are intended to apply exclusively to trunked systems. Also, the second and third criteria, which appear to favor existing system operators over new applicants, are not justified adequately in NABER's view. NABER also points out that the Commission is silent regarding the means to be used to measure the third criterion. Finally, NABER is concerned that the criteria do not appear to be applicable to the three non-SMRS service categories. No specific recommended changes are included in the NABER petition.

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[24] The three criteria were (1) the efficiency of the proposed system including whether it is conventional or trunked; (2) whether the application would expand a fully loaded trunked system, with larger trunked systems being favored; and (3) whether an applicant would exceed the loading requirements by either loading faster or accommodating more mobile units than specified in the Rules.

B. Decision

32. When the *Second Report and Order* in this proceeding was adopted, it was anticipated that only in the SMRS category would more applications be received initially for channels than were available. The three criteria were drafted essentially for use in selecting among applicants within the SMRS category. The applications which were filed pursuant to the *Second Report and Order* in fact bear out the Commission's projections. There were no categories in any geographic area of the country in which the number of applicants exceeded the number of available frequencies, except in the SMRS category. In light of this, APCO's petition on this point is moot, and we will not promulgate comparative criteria for categories other than the SMRS category at this time. If at a later date frequency shortages arise in other categories, we will promulgate the comparative criteria to govern the selection process in those categories.

33. With regard to the SMRS category, we agree with Motorola and NABER that the third comparative criterion enumerated in our *Second Report and Order* may be difficult to quantify. In addition, the use of this criterion could result in some applicants making inflated promises to gain a comparative advantage. We do not want the comparative criteria to create incentives for applicants to speculate or make overly optimistic representations to the Commission. Consequently, we have decided to eliminate the third criterion as a factor in selecting among applicants for channels in the SMRS category.

34. The two remaining criteria: (1) the efficiency of the proposed system; and (2) whether the application would expand a fully loaded trunked system, are both predicated on the Commission's desire to foster more efficient use of the spectrum. The higher efficiency of trunked systems relative to conventional systems is a well established fact. A review of the various theoretical trunking formulas indicates that any increase in the number of channels in a trunked system results in a corresponding increase in the communications capacity per channel of that system. However, it has occurred to us that there may be some confusion in applying the first criterion. Our intent in the *Second Report and Order* was to award a comparative advantage for trunked operation. Therefore, we are modifying the first criterion to read as follows: whether the proposed system is conventional or trunked.

35. Motorola's suggestion to add a criterion which would prefer a non-interconnected system over an interconnected system has been considered. However, the Commission is not persuaded that it would be in the public interest to restrict user choices by preferring non-interconnected systems over interconnected systems. To the contrary, this entire proceeding has been predicated on a regulatory

philosophy which seeks to maximize the communications choices and options available to private land mobile licensees in meeting their communications needs in recognition of the fact that thereby the totality of public service is enhanced through more efficient operation. Motorola's suggestion would appear to be contrary to this philosophy, and we reject it.

36. The two comparative criteria will be given equal weight in evaluating the qualifications of applicants in the SMRS category and awarding comparative points during expedited hearing proceedings in these cases. One point will be awarded to each applicant proposing to operate a trunked system. Applicants proposing to expand existing loaded trunked systems also will be awarded one point. Therefore, each applicant will receive two, one, or no comparative points based on the above criteria. No fractional points will be awarded to any applicant. Applications will be ranked based on the number of comparative points awarded, and grants will be made first to those applications with the most comparative points. If sufficient channels are not available in a geographic area to grant all SMRS applications with the same number of comparative points, grants among this tied group will be made in accordance with the Commission's random selection procedures described in the *Second Report and Order* in General Docket No. 81–768, 48 Fed. Reg. 27182 (June 13, 1983).

Equipment Manufacturer SMR Ownership

A. Discussion

37. Two petitioners seek reconsideration of the Commission's decision to eliminate the restriction regarding licensing of trunked SMR systems to RF equipment manufacturers. Johnson and Telocator request that the Commission reinstate the previous rules which restricted RF equipment manufacturers to ownership of only one trunked SMR system in the country. In addition, NMRA has indicated its opposition to the Commission's action on this issue in a Petition for Review to the U.S. Court of Appeals for the District of Columbia.[25]

38. Johnson and Telocator argue that contrary to the Commission's assertion that manufacturer entry into the trunked SMR market will be pro-competitive, such entry will be anti-competitive. Johnson cites the dominant position of Motorola in the land mobile market as evidence that Motorola has market power and could use

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[25] *National Mobile Radio Association* v. *Federal Communications Commission*, Petition for Review, U.S. Court of Appeals for the District of Columbia, No. 82–2095, September 17, 1982; *NMRA* v. *FCC*, Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 82–2095, October 6, 1982; *NMRA* v. *FCC*, Application for Reinstatement and Consideration of National Mobile Radio Association's Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 82–2095, November 17, 1982.

such power to eliminate competing trunked SMR systems. Telocator refers to the comments in PR Docket 79–107[26] as evidence of the market power and anti-competitive conduct of Motorola, and claims that the Commission cannot simply dismiss these filings as unsubstantiated allegations, but must investigate these claims to determine their validity before dismissing them. Telocator goes on to suggest that equipment manufacturers be required to create a separate subsidiary for their trunked SMR operations, if the Commission decides to affirm its decision to permit their entry into this market.

39. NMRA, in its appeal, has argued that the Commission removed the restriction on manufacturer ownership without a record to support such an action. Furthermore, it asserts that manufacturers may offer communication service at prices which are below cost, in order to encourage sales of mobile radio equipment. This cross subsidization, NMRA claims, will result in the economic destruction of many SMRS operators, and the emergence of an SMRS industry dominated by RF equipment manufacturers.

B. Decision

40. The Commission has carefully considered the information presented on reconsideration of this issue and is affirming its decision to eliminate the restriction on RF equipment manufacturer ownership of trunked SMR systems. Johnson asserts that because Motorola has market power in the land mobile market, Motorola will necessarily use this power in an anti-competitive manner. As we clearly stated in the *Second Report and Order* in this proceeding, we believe that the tangible public interest benefits of relaxing the restrictions outweigh the speculative anti-competitive risks.[27] Furthermore, we feel that existing antitrust laws provide adequate protection against any possible anti-competitive activity on the part of equipment manufacturers.

41. In examining this matter we have reviewed case law pertaining to competition in the communications field. While the subject matter before us involves private carriers, and while the considerations between private and common carriers differ, we think some useful guidance regarding our statutory obligations can be gleaned. Thus, while decisions of the Supreme Court and the Court of Appeals for the District of Columbia Circuit establish that the Commission may not authorize competitive duplication of communications facilities on the mere assumption that competition is, as a general proposition, a good thing,[28] it is equally clear that the

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[26] *Notice of Inquiry*, PR Docket 79–107, FCC 79–283 (May 11, 1979).

[27] *Second Report and Order*, PR Docket 79–191, 90 FCC 2d 1281 (1982), 47 Fed. Reg. 41002 (September 16, 1982), paragraphs 128–129.

[28] See *FCC* v. *RCA Communications*, 346 U.S. 86, 73 S. Ct. 998, 97 L.Ed. 1470 (1953);

Commission may lawfully allow, and indeed encourage, entry of multiple licensees offering overlapping services, if it has reviewed the characteristics of the particular communications field involved and rationally concluded that competition in that field is reasonably feasible and predictably would further the public interest in larger, more economical, and more effective communications service.[29] The test which the courts have established is first that the Commission must be able reasonably to forecast that new entry will not so severely impair the economic base of existing licensees that the industry would experience an incidence of failure so high as to impair the overall provision of service[30] and, second, that injection of new providers will probably result in better, cheaper, or more innovative communications offerings.[31] These forecasts must have some ascertainable foundation in the record; at the same time, however, conclusions on the future conduct of licensees, the anticipated reaction of investors, the expected course of technological development, and other assumptions about the functioning of tomorrow's communications market are unavoidable exercises in prediction.[32] Recognizing this, the Courts have held that the Commission has satisfied its statutory obligations if:

> the agency's decisional memoranda reveal that it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.[33]

42. In our *Second Report and Order*, we explained the original rationale for the restriction on manufacturers' entry and the limited

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Hawaiian Tel. Co. v. *FCC*, 162 U.S. App. D.C. 229, 498 F.2d 771 (1974); *U.S.* v. *FCC* 652 F.2d 72 (1980); See also *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940); *WLVA, Inc.* v. *FCC*, 148 U.S. App. D.C. 262, 459 F.2d 1286 (1972); *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

[29] See *FCC* v. *RCA Communications, supra*, 346 U.S. at 96–97, 73 S. Ct. at 1004–1005, 97 L.Ed. at 1478–1479; *Western Union Tel. Co.* v. *FCC*, 214 U.S. App. D.C. 308, 325–326, 665 F.2d 1126, 1143–1144 (1981); *RCA Communications v. FCC*, 99 U.S. App. D.C., 163, 238 F.2d 24 (1956) (proceedings on remand), *cert. denied*, 352 U.S. 1004, 77 S. Ct. 563, 1 L.Ed.2d 549 (1957).

[30] *Carroll Broadcasting, Co.* v. *FCC*, 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443 ("economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service"). *Accord, FCC* v. *Sanders Brothers Radio Station*, 309 U.S. at 476 60 S.Ct., at 698, 84 L.Ed. at 874–875; *WLVA, Inc.* v. *FCC*, 148 U.S. App. D.C. at 273, 459 F.2d at 1297; *Telocator Network of America* v. *FCC*, 691 F.2d 525 (1982).

[31] See *FCC* v. *RCA Communications, supra*, 346 U.S. at 97, 73 S.Ct. at 1005, 97 L.Ed. at 1479 ("the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it").

[32] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594–596 (1981); *FCC* v. *RCA Communications, supra*, 346 U.S. at 96–97, 73 S.Ct. at 1005, 97 L.Ed. at 1478–1479.

[33] *Telocator Network of America* v. *FCC*, *supra*, F.2d at 545.

intended duration of this restriction. We stated how circumstances had changed and what policy objectives we felt the change in the rule would accomplish. We also noted the lack of consensus in the comments. However, after analyzing all of the evidence before us, we concluded that allowing equipment manufacturers to compete on an equal basis with all other SMRS entrepreneurs would enhance competition in the offering of private land mobile communications, thus benefiting all users and the public at large; would enhance spectrum utilization; would result in enhanced operational efficiency and better service; and could result in the offering of private carrier service in market areas in which trunked technology is not currently available.[34]

43. Notwithstanding the positions taken in the petitions for reconsideration, we conclude we have satisfied the standards established by the Congress and the courts. For the reasons discussed in the *Second Report and Order* we affirm our conclusion that competition in the SMRS area will further the public interest in larger, more economical and more effective communications service by resulting most probably in better, cheaper and more innovative service offerings. In reaching this conclusion based on the record before us, both then and now, we do not find any substantiation of the allegation that these new entrants will so severely impair the economic base of existing carriers that the industry would experience an incidence of failure so high as to impair provision of service to those persons which existing private carriers are authorized to serve.

44. Telocator argues that we have not done enough. In effect, it would require us conclusively to disprove its allegations of harm to existing SMRS's. Telocator has misperceived our duty, however. As the Court of Appeals noted in *Telocator* v. *FCC, supra*:

> We have no doubt that some or all of these arguments raised concerns that would have been quite relevant if accompanied by supporting statistics or other documentation. Having chosen not to substantiate its claims, however, Telocator cannot here complain that the Commission continued to stand on facts and figures in its possession. To be sure, an agency has some affirmative obligation to ensure that it has materials sufficient to enable an informed and reasonable decision. But, however broad the scope of this inquisitorial duty may be, it clearly does not extend to ferreting out evidence within the grasp of a commenting party merely on that party's claim that such evidence exists and controverts materials already before the agency.[35]

45. By expanding the number of available frequencies, as well as the entities that could provide service, we significantly enlarged the

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[34] In fact, subsequent to our *Second Report and Order*, applications from RF equipment manufacturers were received and several trunked system licenses have already been granted to manufacturers in market areas in which trunked technology was not previously available.

[35] *Id.* at 546.

opportunity for marketing private land mobile communications. We concluded that this new entry carried the potential for operations of higher caliber and lower cost, as well as the impetus for technological advancement. The courts have consistently held that such expectations, when rooted in the agency's informed assessment of the trends and needs of the industry, can form valid and reasonable bases for adoption of an open entry policy, even though they are necessary predictions incapable of absolute proof.[36] In reaching these decisions we identified in our *Second Report and Order* the relevant issues, gave them thoughtful consideration and formulated our judgement on them based on the public interest policies we sought to effectuate. On reconsideration, no additional facts have been brought to our attention that cause us to alter our previous conclusions. We therefore reject Telocator's and NMRA's assertions.

46. Finally, we find no reason to adopt Telocator's suggestion that manufacturers be required to establish a separate subsidiary to operate trunked SMR systems. The Commission is reluctant to impose such a burden on manufacturers without a solid record to support such an action. Since there is no record to support such a requirement, and since Telocator provides no compelling arguments to support its suggestion, we reject it.

Termination of PR Docket 79–107

A. Discussion

47. Telocator, in its petition, argues that the Commission erred in closing PR Docket 79–107 (*Notice of Inquiry* regarding the licensing of community repeaters in the 800 MHz band) in the *Second Report and Order* in this proceeding. Telocator suggests that the Commission may not dismiss the comments submitted in that *Inquiry* without first investigating their validity.

B. Decision

48. As discussed above under the Equipment Manufacturer SMR Ownership issue, the Commission is not obligated to consider unsubstantiated allegations in its deliberations. Although Telocator asserts that there is substantial evidence related to entry barriers, bottlenecks, and anti-competitive practices by industry participants, it has provided no specific evidence of the alleged practices either in this proceeding or in its comments in PR Docket 79–107. The Commission examined and reviewed the information in PR Docket 79–107 and was not persuaded that any substantive evidence existed which demonstrated that the facts were as alleged or that the public interest would be disserved by terminating that proceeding. The Commission could not accept the general information and allega-

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[36] *Id.* at 545.

tions contained in the comments to PR Docket 79–107 as evidence of actual or potential wrong doings. Although we stand ready to accept substantiated complaints which may be brought to our attention, none have been forthcoming. Therefore, we are affirming here our decision to terminate the proceeding in PR Docket 79–107.

Trunked SMR System Application Processing Procedures

A. Discussion

49. In its *Petition for Review* to the U.S. Court of Appeals, NMRA raises the issue of Commission treatment of applicants on waiting lists for trunked frequencies, an issue that was not raised by any petitioners on reconsideration. In order to present a complete discussion of the issues, NMRA's point will be considered below.

50. NMRA contends that the *Second Report and Order*, by creating a new rule subpart to govern the 250 channel pairs released in PR Docket 79–191, unfairly disadvantaged entities with applications pending for trunked SMR systems.[37] NMRA also contends that all channels for trunked SMR systems should be regulated in the same way. Therefore, NMRA would put all applicants for trunked SMR systems into a single queue for processing. NMRA's rationale is that the entire 600 channel allocation should be considered as a whole, rather than in the bifurcated approach taken by the Commission. NMRA argues that with the exception of RF equipment manufacturers, all those who want to operate a trunked SMR system either are already licensed or are on a waiting list.[38] Consequently, if the Commission had not eliminated the restriction on manufacturer licensing, there would have been no need to deviate from the traditional first-come, first-served approach to application processing.

B. Decision

51. The Commission has carefully considered the arguments raised by NMRA and is affirming its decision to implement a bifurcated regulatory structure for 800 MHz. In essence, NMRA takes the position that the Commission lacks the power to alter its regulatory policies in light of changing circumstances. We reject such a circumscription of our authority. In our *Second Report and Order* in Docket No. 18262 which made the original spectrum allocation, we noted our intention to revisit the rules we were adopting and to adjust them if warranted.[39] Furthermore, the courts have long affirmed the Commission's power to adopt, at any time,

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[37] See *NMRA* v. *FCC*, Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 82–2095, October 6, 1982, p.23.

[38] *NMRA* v. *FCC*, *op. cit.*, p.25.

[39] *Second Report and Order*, Docket No. 18262, *supra*, at para 108.

new rules determined to be necessary for the orderly conduct of its business. The Commission is not inflexibly bound to regulations which it adopted in the past if it determines that public interest considerations warrant a change in the rules.[40] The Commission does not agree with NMRA that, with the exception of manufacturers, all those who wanted to operate trunked SMR systems have already been licensed or have applied for licenses. The land mobile industry has undergone many changes. It is clear from the extensive list of applicants for new SMRS channels in the major metropolitan areas that, contrary to NMRA's assertion, there are many applicants, in addition to manufacturers, who either have not been licensed or have not previously applied for authorizations to operate trunked SMR systems in particular geographic areas. Furthermore, the Commission carefully considered applicants on waiting lists in developing its modified regulatory structure for trunked SMR systems. The conflicting goals of dealing equitably with those applicants on waiting lists as well as potential applicants for the new channels were balanced. Under the approach adopted in the *Second Report and Order*, previous applicants for trunked SMR systems could retain their places in line for channels from the original 200 channel trunked allocation, and could apply for a grant from the 80 new channels released for SMR systems. New applicants could apply for old channels, and join queues behind prior applicants, or they could apply for new channels. We are convinced that this bifurcated approach provided the most equitable solution possible to the problem of balancing the interests of old and new applicants for trunked SMR systems against our regulatory objectives for 800 MHz.

Miscellaneous Matters

52. In accordance with our decisions upon reconsideration, we are amending, as indicated in the attached Appendix, rule sections §§ 90.366(h), 90.631(e), and 90.633(f) to permit primary status for remote or satellite stations in wide-area systems; §§ 90.366(a), 90.366(c) and 90.627(b)(2) to change certain trunk system loading requirements; § 90.366(g) and § 90.629 to permit extended implementation schedules in the Business Radio Service; and § 90.645(h), to extend paging capability to shared systems.

53. Additionally, we are amending several other rules to conform them to changes made as a result of non-rulemaking events. These are amendment of: § 90.611(c) and § 90.621(a) permitting conventional SMRS system applicants to utilize frequency coordinating committees;[41] and § 90.619(a)(1) and (b)(6) to reflect changes

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[40] See *e.g. U.S.* v. *Storer Broadcasting Company*, 351 U.S. 192, 100 L. Ed. 1081, 76 S. Ct. 763 (1975). *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1942).

[41] When the *Second Report and Order* was adopted, no entity was willing to serve as

necessitated by existing 800 MHz agreements with Mexico and Canada. Finally, we are taking this opportunity to make several minor editorial changes, such as correcting typographical errors, inserting current form numbers, and clarifying ambiguous language, in our rules. With respect to these amendments, we find that good cause exists for dispensing with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. Because these changes involve minor, noncontroversial amendments, public notice and comment is unnecessary. The following list tabulates the changes (as listed by paragraph number in the Appendix).

Appendix Paragraph No.	*Rule Section*	*Change*
1.	1.925(h)	clarification
2.	90.155(a)	editorial
3.	90.354	editorial
4.	90.356(a)	editorial
5.	90.362	editorial
6.	90.364(b)(2)	clarification
7.	90.366(a)	rule change
	(c)	rule change
	(d)	clarification
	(e)	clarification
	(f)	clarification
	(g)	rule change
	(h)	rule change
8.	90.376(a)	clarification
	(1)	editorial
9.	90.492	editorial
10.	90.605	editorial
11.	90.611(c)	clarification
12.	90.613	editorial
13.	90.615	editorial
14.	90.619(a)	editorial
	(a)(1)	rule change
	(b)(6)	rule change
15.	90.621(a)	clarification
	(a)(1)(iv)	editorial
16.	90.623(b)	editorial
	(c)	editorial
	(d)	clarification
17.	90.627(a)	editorial
	(b)(2)	rule change
18.	90.629 1st sent	rule change
	(b)	clarification
	(c)	rule change
19.	90.631(a)	editorial
	(d)	clarification

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a frequency coordinator for conventional SMRS base stations. As a result, the option of using the services of a frequency coordinator was not explicitly included for SMRS eligibles. Subsequently, NABER offered its services and was recognized as the coordinator for conventional SMRS base stations in Public Notice No. 3950, May 3, 1983. Consequently, we are modifying our rules to include specifically the frequency coordination option for conventional SMRS base station applicants.

Appendix Paragraph No.	*Rule Section*	*Change*
	(e)	rule change
20.	90.633(e)	clarification
	(f)	rule change
21.	90.637(a)	clarification
	(1)	editorial
22.	90.645(g)	clarification
	(h)	rule change

54. In summary, the Commission is affirming all aspects of the *Second Report and Order* in this proceeding, except for the following changes. First, eligibility to obtain Commission approval of extended system implementation schedules has been broadened to include the Business Radio Service. Second, paging will be permitted on multiple licensed systems, in those cases in which all system licensees agree to such transmissions on their assigned channel. Third, the comparative criteria to be used in cases in which applications are received for more SMRS category frequencies than are available are modified. Fourth, loading requirements for trunked systems have been modified to count control stations, and to permit trunked system licensees to obtain additional channels when their existing systems are loaded to 80% of the loading standard. Finally, several rules have been corrected to eliminate confusing and/or contradictory language and to clarify certain rules where necessary.

55. Accordingly, IT IS ORDERED That, effective December 8, 1983, Part 90 of the Commission's Rules IS AMENDED as shown in the Appendix, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. IT IS FURTHER ORDERED that the petitions for reconsideration and clarification in this proceeding ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix

Parts 1 and 90 of 47 CFR are amended as follows:

1. § 1.925 is amended to read:

§ 1.925 Application for special temporary authorization, temporary permit, temporary operating authority, or interim amateur permit.

* * * * *

(h) An applicant for a radio station license under Part 90, Subpart M, of this chapter to utilize an already existing SMRS facility or to utilize an already licensed transmitter may operate the radio station for a period of up to 180 days, under a temporary permit evidenced by a properly executed certification of FCC Form 577 after the mailing of a formal application for station license, provided that the antenna(s) employed by the control station(s) is (are) a maximum of

twenty feet above a man-made structure (other than an antenna tower) to which it (they) is (are) affixed.

2. § 90.155 (a) is amended to read:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraph (b) and in §§ 90.366(d) and (g), 90.629 and 90.631(c), must be placed in operation within 8 months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

3. § 90.354 is amended to read:

§ 90.354 Forms to be used.

Applications for trunked radio facilities shall be submitted on FCC Forms 574 and 574-A, and such applications shall be filed with the Federal Communications Commission, Gettysburg, PA. 17325.

4. § 90.356(a) is amended to read:

§ 90.356 Supplemental information to be furnished by applicants for facilities under this subpart.

(a) Applicants proposing to provide trunked systems of communication to eligibles under this part on a commercial basis must, in addition to the information required by FCC Forms 574 and 574-A, furnish the following data and material:

* * * * *

5. In § 90.362, the frequencies in Block 8 of Table 1 are corrected, footnote 3 of Table 2 is amended, and subparagraph (b) is replaced in its entirety.

§ 90.362 Selection and assignment of frequencies.

(a) * * *

Table 1 - CHANNELIZATION FOR TRUNKED SYSTEMS

Block No.	*Channel No.*	*Mobile frequency/base frequency (MHz)*	
*	*	*	*
8	28-68-108-148-188	820.3125/865.3125 819.3125/864.3125 818.3125/863.3125 817.3125/862.3125 816.3125/861.3125	

* * * * *

Table 2 - Chicago Plan[2] [3]

* * * * *

[3] Stations located beyond the 70 mile distance authorized on or before August 16, 1982 to use these frequencies may continue to do so. Stations beyond the 70 mile distance authorized after August 16, 1982 shall employ frequencies listed in Table 1 subject to the provisions of § 90.621(b) or (c) as applicable.

* * * * *

(b) Stations authorized by the Commission to operate in the 816–821 and 861–866 MHz band will be afforded protection solely on the basis of the mileage

separation criteria set out below. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

* * * * *

6. § 90.364 (b)(2) is amended to read:

§ 90.364 Limitation on the number of frequency pairs assignable for trunked systems and on the number of trunked systems.

* * * * *

(b) * * *

(2) That the licensee's existing trunked system(s) authorized on or before October 16, 1982 is loaded to 80% of its authorized capacity or 80 mobile units if authorized after October 16, 1982.

7. § 90.366 (a), (c), (d), (e), (f), (g), and (h) are amended to read:

§ 90.366 Trunked system loading requirements

(a) Loading requirements for trunked systems authorized on or before October 16, 1982 are shown in Table 1. Trunked systems authorized after October 16, 1982, will be authorized on the basis of a minimum loading criterion of 100 mobile units per channel.

TABLE 1. - Loading Requirements for Trunked Systems

Service group[1]	*Mobile radio units*[2]		
	5-channel systems	*10-channel systems*	*20-channel systems*
Police and fire group	300	750	1,500
Business radio group[3]	500	1,000	2,000
Motor carrier group (urban and interurban passenger motor carriers only)	800	1,600	2,500
Other services group[3]	400	800	1,600
Mixed service group	500	1,000	2,000

[1] No provision is made for use of trunked systems by persons eligible in the taxicab radio service, since this mode of communication is not compatible with normal transmissions requirements of taxicab companies.

[2] For loading trunked systems of communication, mobile radio units shall include vehicular and portable mobile units and control stations.

[3] When the primary activity of the licensee is the operation of urban or interurban passenger motor carriers, the loading requirements shall be as shown for the motor carrier group.

* * * * *

(c) If no more frequencies are available for assignment in the system's geographic area, a licensee may apply for admission to the waiting list when the system reaches 70% of its specified capacity.

(d) Licensees of trunked facilities must complete construction within one year of initial grant; Provided, however, that a licensee of a trunked facility assigned more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five-channel group of the authorized facility

within one year. At the end of two years the licensee must demonstrate, notwithstanding the provisions of subparagraph (b), that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent, and all trunked channels are assigned in the system's geographic area, authorization for channels in excess of five cancels automatically. If at the end of five years the 5-channel system is not loaded to 70 percent of the prescribed level for this period of time and all trunked channels are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. All licenses are subject to this condition. A licensee may only modify the election to build or not build a system in stages within the first year of authorization. If the election is changed there will be no extensions of time to complete construction.

(e) If at the end of a license term, a trunked system is not loaded to 70% and all frequencies are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. All licenses are subject to this condition.

(f) If a station is not placed in permanent operation within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission.

(g) For applications in the Public Safety, Land Transportation and Industrial Services (except for the Radiolocation Service), a period of up to three (3) years may be authorized for placing a station in operation in accordance with the following:

(1) * * *

(i) The proposed system will serve a large fleet (i.e., 200 or more mobile units) and will involve a multi-year cycle for its planning, approval, funding, purchase and construction; or,

(ii) * * *

* * * * *

(h) Wide area systems may be authorized to persons eligible for licensing under Subparts B, C, D, or E of this Part upon an appropriate showing of need. Remote or satellite stations of wide area systems in the Police, Fire, Local Government, Highway Maintenance, Forestry-Conservation, Special Emergency, Telephone Maintenance and Power Radio Services will be authorized on a primary basis if such stations are the first to be authorized in their area of operation on the frequency or group of frequencies. Remote or satellite stations of wide area systems in all other services will be authorized only on a secondary, non-interference basis to co-channel licensees. To determine system loading, the total number of mobile units and control stations operating in the wide-area system shall be counted with respect to the total number of base station frequencies assigned to the system.

8. § 90.376 (a) and (1) are amended to read:

§ 90.376 Restrictions on operational-fixed stations

(a) Except for control stations, operational fixed operations will not be authorized in the 816–821 and 851–866 bands. This does not preclude secondary fixed tone signalling and alarm operations authorized in § 90.235.

(1) Control stations associated with one or more mobile relay stations will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference shall not be caused to stations of licensees authorized to use the frequency for mobile service communications.

* * * * *

9. § 90.492 is amended to read:

§ 90.492 One-way paging operations in the 806–821 and 851–866 MHz bands.

Paging operations are permitted in the 806–821 and 851–866 MHz bands only in accordance with §§ 90.378 and 90.645(e) and (h).

10. § 90.605 is amended to read:

§ 90.605 Forms to be used.

Applications for conventional and trunked radio facilities shall be submitted on FCC Forms 5 74 and 5 74-A and such applications shall be filed with the Federal Communications Commission, Gettysburg, PA. 17325.

11. § 90.611 (c) is amended to read:

§ 90.611 Processing of applications.

* * * * *

(c) Each application will then be reviewed to determine whether it can be granted. Frequencies must be specified by applicants in the Public Safety/Special Emergency, Industrial/Land Transportation and Business categories, and by SMRS applicants for conventional channels pursuant to the provisions of § 90.621. SMRS applicants for trunked frequencies may select their frequencies pursuant to § 90.621 or request the Commission to select frequencies.

12. In § 90.613, Table of Channel Designations, change channel 355 from 814.7825 MHz to 814.8625 MHz.

13. § 90.615 is amended to read:

§ 90.615 Frequencies available for conventional systems in the 806–809. 750/851–854. 750 MHz bands.

* * * * *

14. § 90.619 (a), Table 1 of (a)(1), and (b)(6) are amended to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

(a) U.S./Mexico border area. The channels listed in Tables 1–4 are offset 12.5 kHz lower in frequency than those specified in § 90.613. The Channel 201 mobile frequency will be 811.000 MHz, followed by Channel 202 at 811.025 MHz and proceeding with uniform 25 kHz channeling to Channel 400 at 815.975 MHz. Base station frequencies will be 45 MHz higher in frequency. These channels are available for assignment for conventional or trunked systems only in areas 68.4 miles (110 km) or less from the U.S./Mexico border. Stations located on Mt. Lemmon, serving the Tucson, AZ area, shall only be authorized offset frequencies.

(1) * * *

Table 1.
U.S./Mexico Border Area
Public Safety Category - 55 Channels

Offset Group Number	*Offset Channel Numbers*	*Offset Group Number*	*Offset Channel Numbers*
201 (Note 1)	241-281-321-361	207	207-247-287-327-367
202	202-242-282-322-362	208	208-248-288-328-368
203	203-243-283-323-363	209	209-249-289-329-369
204	204-244-284-324-364	210	210-250-290-330-370
205	205-245-285-325-365	211	211-251-291-331-371
206	206-246-286-326-366		

Note 1-Offset group 201 is available for conventional system use only. Offset channel 201 is not available for use in the U.S./Mexico border area.

* * * * *

(b) * * *

(6) Two Canadian television stations provide service in British Columbia in the band 806–890 MHz in accordance with the U.S./Canadian Television Agreement of 1952. They are:

Enderby, B.C.	Channel 72	818-824 MHz.
Radium/Hot Springs, B.C.	Channel 77	848-854 MHz.

* * * * *

15. § 90.621 (a), (a)(1)(i) and (a)(1)(iv) are amended to read:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants eligible in the Public Safety/Special Emergency, Industrial/Land Transportation and Business Categories, and applicants eligible in the SMRS Category requesting conventional frequencies, must specify the frequencies on which the proposed system will operate pursuant to a field study or a recommendation by the appropriate frequency coordinating entity. SMRS applicants requesting trunked frequencies may specify on the basis of a field study the frequencies desired or may request the Commission to select and assign frequencies for the system.

(1) * * *

(i) All mobile, control, and base station frequencies must be chosen from those listed in §§ 90.613, 90.617 and 90.619.

* * * * *

(iv) The maximum number of frequencies which will be assigned to an SMRS applicant at any one time is five (5) frequency pairs.

* * * * *

16. § 90.623 is amended by modifying subparagraphs (b) and (c)(2) and adding subparagraph (d) to read:

§ 90.623 Limitation on the number of frequencies assignable for conventional systems.

* * * * *

(b) Where an applicant proposes to operate a conventional radio system to provide facilities for the use of a single person or entity eligible under Subparts B, C, D, or E of this part, the applicant may be assigned only the number of frequency pairs justified on the basis of the requirements of the proposed single user of the system.

(c) ***

(2) The licensee's existing frequency pair(s) is loaded to prescribed levels.

* * * * *

(d) No licensee will be authorized frequencies for a conventional system if that licensee is operating an unloaded trunked system or has an application pending for a trunked system to serve multiple subscribers within 40 miles of the requested conventional system.

* * * * *

17. § 90.627 (a) and (b)(2) are amended to read:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

(a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty. There is no minimum number of frequency pairs that may be assigned for the operation of a trunked radio system. The maximum number of frequency pairs that may be assigned at any one time for the operation of an SMR trunked system is five. There is no minimum number of frequencies that may be assigned for the operation of an SMR trunked system.

(b) ***

(2) That the licensee's existing trunked system is loaded to at least 80% of its authorized capacity.

18. In § 90.629, the opening sentence and subparagraph (b) are amended, and a new paragraph (c) is added to read as follows:

§ 90.629 Extended implementation schedules.

For applicants in the Public Safety/Special Emergency, Industrial/Land Transportation and Business Categories requesting either trunked or conventional frequencies, a period of up to three (3) years may be authorized for placing a station in operation in accordance with the following:

* * * * *

(b) Authorizations under this Section are conditioned upon the licensee's compliance with the implementation schedule. If the licensee fails to meet the schedule, and all channels are assigned in the system's geographic area, authorization for trunked channels not loaded to 100 mobile stations cancels automatically. Conventional channels not loaded to 70 mobile units may be subject to shared use by the addition of other licensees. The licensee must submit a report to the Commission's Private Radio Bureau, Gettysburg, PA 17325 annually, showing the extent to which the authorized system has been implemented. A copy of the report must be submitted to the licensee's frequency advisory committee.

(c) Applicants eligible in the Industrial/Land Transportation Category requesting authorizations under this Section may request frequencies in the Business Category only if the application contains a statement that no frequencies in the Industrial/Land Transporation Category are available for assignment in their geographic area.

19. § 90.631 (a), (d), and (e) are amended to read:

§ 90.631 Trunked system loading requirements.

(a) Trunked systems will be authorized on the basis of a minimum loading criterion of 100 mobile stations per channel.

* * * * *

(d) If a station is not placed in permanent operation within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission.

(e) Wide area systems may be authorized to persons eligible for licensing under Subparts B, C, D, or E of this Part upon an appropriate showing of need. Remote or satellite stations of wide area systems in the Police, Fire, Local Government, Highway Maintenance, Forestry-Conservation, Special Emergency, Telephone Maintenance and Power Radio Services may be authorized on a primary basis if such stations are the first to be authorized in their area of operation on the frequency or group of frequencies. Remote or satellite stations of wide area systems in all other services will be authorized only on a secondary, non-interference basis to co-channel licensees. To determine system loading, the total number of mobile units and control stations operating in the wide-area system shall be counted with respect to the total number of base station frequencies assigned to the system.

20. § 90.633 (e) is revised to read:

§ 90.633 Conventional systems loading requirements:

* * * * *

(e) A licensee may apply for additional frequency pairs if its authorized conventional channel(s) is occupied to 70 mobiles. Applications may be considered for additional channels in areas where spectrum is still available and not applied for, even if the already authorized channel(s) is not loaded to 70 mobile units, upon an appropriate demonstration of need.

* * * * *

21. § 90.637 (a) introductory text and (a)(1) are revised to read:

§ 90.637 Restrictions on operational fixed stations

(a) Except for control stations, operational fixed operations will not be authorized in the 816–821 and 861–866 MHz bands. This does not preclude secondary fixed tone signalling and alarm operations authorized in § 90.235.

(1) Control stations associated with one or more mobile relay stations will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference shall not be caused to stations of licensees authorized to use the frequency for mobile service communication.

* * * * *

22. In § 90.645 paragraph (g) is revised and paragraph (h) is added to read:

§ 90.645 Permissible operations.

* * * * *

(g) Up to five (5) contiguous channels as listed in §§ 90.615, 90.617, and 90.619 may be authorized after justification for systems requiring more than the normal single channel bandwidth. If necessary, licensees may trade channels amongst themselves in order to obtain contiguous frequencies. Notification of such

proposed exchanges shall be made to the appropriate frequency coordinator(s) and to the Commission for approval.

(h) Paging operations may be utilized on multiple licensed facilities (community repeaters) only when all licensees of the facility agree to such use.

* * * * *

Common Carrier, Authorization
Common Carrier, Rates, Charges
Competition, Common Carriers

Inquiry adopted into options for long-run regulation of AT&T's basic domestic interstate services.
-AT&T Co.
CC Docket No. 83–1147

FCC 83–482

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Long-Run Regulation of AT&T's Basic Domestic Interstate Services	CC Docket No. 83–1147

Notice of Inquiry

(Adopted: October 19, 1983 Released October 27, 1983)

BY THE COMMISSION:

I. *Introduction*

1. We hereby give Notice of Inquiry into the appropriate long-run regulation of AT&T's basic interstate services under the policies of the Communications Act of 1934 and the statutory obligations of this Commission. This proceeding is intended to look into the future and begin the public policy discussion on regulatory practices regarding AT&T which will serve the public interest. No immediate deregulatory actions will be ordered in this proceeding. In light of the major changes which have occurred in the telecommunications industry, the Commission would be remiss merely to assume that the existing policies and practices for regulating AT&T will continue to promote the public interest for the indefinite future. Accordingly, we are interested in obtaining information and analysis in four areas: (1) costs and benefits of continuing the present regulatory scrutiny of AT&T through 1990; (2) possible options for reduced regulation of AT&T; (3) under what conditions we might pursue each option; and (4) how to assess AT&T's future market power. Because of the unique factors affecting international communications services, this Inquiry is limited to AT&T's domestic interstate operations. This Notice will explain the Commission's motivations for this Inquiry and describe topics for comments.

2. This Notice grows out of three sets of concerns. First, there

have been fundamental changes in the telecommunications marketplace calling into question the desirability of continuing present regulatory approaches to AT&T in the future. Additional changes are imminent. Among the major changes are divestiture of AT&T's interexchange services from the Bell Operating Companies' exchange operations accomplished by the Modified Final Judgment (MFJ) in *United States v. AT&T*[1]; growth of the interstate facilities of terrestrial and satellite carriers in competition with AT&T[2]; growth of resellers[3]; and development of nondiscriminatory access charges and interconnections for interexchange carriers to exchange facilities under our decision in *MTS/WATS Market Structure*[4] and the MFJ. Competitive developments already have generated substantial regulatory changes, including *Second Computer Inquiry*[5] *and Competitive Carrier Rulemaking.*[6] These decisions involve judgments by this Commission that, where effective competition will promote the purposes of the Communications Act, detailed regulatory scrutiny of rates and facilities is not required by the provisions or policies of the Act. Under *Second Computer Inquiry*, AT&T can provide enhanced services and customer premises equipment on an unregulated basis through a separate subsidiary. AT&T has repeatedly requested that the Commission streamline regulation of, or forbear from regulating, some of its services based on the competition it faces.[7] This Inquiry explores whether the domestic, interstate telecommunications marketplace warrants, or soon may warrant, a new long-range direction for reduced regulation of AT&T's basic[8] interstate services under the Act.

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[1] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). The MFJ modified the 1956 consent decree between the United States and AT&T. United States v. Western Elec. Co., 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956).

[2] *See, e.g.*, Allocations of Frequencies in the Bands Above 890 Mc, 27 FCC 359 (1959); Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); Domestic Communications Satellite Facilities, 35 FCC 2d 844 (1972); MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I); MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (Execunet II); Orbit Deployment Plan, 84 FCC 2d 584 (1981); Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982); Assignment of Orbital Locations to Stations in the Domestic Fixed-Satellite Service, FCC 83–186 (released Aug. 12, 1983).

[3] *See, e.g.*, Resale and Shared Use, 60 FCC 2d 261 (1976), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 895 (1978); Resale and Shared Use of Domestic Public Switched Network Services, 83 FCC 167 (1980).

[4] 48 F.R. 10319 (1983), *reconsid.* FCC 83–365 (released Aug. 22, 1983).

[5] 77 FCC 2d 384, *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.* 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[6] 77 FCC 2d 308 (1979) (Notice of Inquiry and Proposed Rulemaking), 84 FCC 2d 445 (1981) (Further Notice of Proposed Rulemaking), 85 FCC 2d 1 (1980) (First Report and Order), 91 FCC 2d 59 (1982) (Second Report and Order), *reconsid.* FCC 83–69 (released March 21, 1983), Mimeo No. 012 (released Oct. 6, 1983) (Third Report and Order), FCC-83–481 (adopted Oct. 19, 1983) (Fourth Report and Order).

3. Second, continuing the present level of regulatory scrutiny of AT&T may cause the Commission to address several difficult matters in the near future. These matters include revision of the interim cost allocation manual[9]; prescription of a new authorized rate of return on AT&T's regulated interstate services[10]; findings of the lawfulness of AT&T's private line rate structures[11]; and, possibly, examination of any changes in MTS rate structures AT&T may file. Inquiry into the appropriate long-range direction for regulation of AT&T and market forces will assist the Commission in deciding how to handle these matters. Even if no change in the direction for regulation of AT&T would promote the purposes of the Communications Act over the next few years, it may be that other regulatory tools and procedures would benefit consumers more than those presently used. As described *infra*, we revised our regulatory practices as we developed improved methods of analyzing and processing AT&T's filings and as the possible regulatory problems related to AT&T's filings and conduct changed. Yet, we have not undertaken a systematic analysis of alternative regulatory practices. Inquiry into such alternatives may help us to make the present regulatory scrutiny of AT&T more efficient.

4. A third concern is that the Commission may lack the necessary information, and procedures for gathering this information, to decide whether a change in its regulation of AT&T at a given time would promote the public interest.[12] We are unsure about what

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[7] AT&T's Petition for Reconsideration in CC Dkt. No. 79-252 (Sept. 22, 1982) (forbearance from regulating resale services of AT&T's separate subsidiary); AT&T's Petition for Rulemaking (May 6, 1983) (streamling regulation of AT&T's international private line services); AT&T's Petition for Further Rulemaking in CC Dkt. No. 79-252 (Aug. 11, 1983) (streamlining regulation of AT&T's specialized satellite services).

[8] "Basic" services are defined in *Second Computer Inquiry* as common carrier communications services which do not (1) employ computer processing applications acting on the format, content, code, or similar aspects of the subscriber's transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information. 77 FCC 2d at 498.

[9] AT&T - Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, *reconsid.*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982); FCC 83-374 (released Aug. 22, 1983).

[10] AT&T, 86 FCC 2d 820 (1981).

[11] AT&T - Private Line Rate Structure and Volume Discount Practices, 74 FCC 2d 226 (1979).

[12] *See* Comptroller General, Legislative and Regulatory Actions Needed to Deal with a Changing Domestic Telecommunications Industry 9 (1981) ("Having established a policy in favor of competition, FCC must be in a position to monitor competitive developments so that regulation may be relaxed in markets where workable competition has been established and maintained in markets where monopoly conditions still exist.").

information we need to make this decision, how we should obtain it, and how we should analyze it. We hope that this Inquiry will help us identify alternative regulatory tools and reduced regulatory approaches, and help us assess their possible costs and benefits. However, to reach a decision we will require actual data on market conditions, the effects of AT&T's rates and conduct, and the effects of our practices. This Inquiry should improve our ability to conduct informed decision making in this area.

5. This Notice seeks to obtain information and analysis of possible future problems and options facing the Commission. It does not propose changes of any rules or policies. However, the record developed in this Inquiry will be used to facilitate the formulation of proposed rules. Comments that are specific in their analysis will be most useful.

II. *Developments Affecting What Regulation of AT&T's Basic Interstate Services Would be in the Public Interest*

6. The Communications Act of 1934 states the purpose of making "available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[13] Pursuant to this purpose, the Act created the Commission and specified regulatory provisions. We noted in *Competitive Carrier Rulemaking* that "[s]o long as our regulation imposes costs on some firms, and thus on the public, not exceeded by the benefits generated thereby, the provision of communications service by those firms can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs.h'[14] Courts have held that the Commission has broad discretion in altering its regulatory practices: "regulatory practices and policies that will serve the public interest today may be quite different from those that were adequate for that purpose in 1910, 1927 or 1945 . . . ."[15] As developments which might affect the costs and benefits flowing from a set of regulatory practices occur, we have the responsibility to evaluate the impacts of those practices and to consider whether those practices best promote the public interest.[16]

7. AT&T initially was the sole carrier for domestic, interex-

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[13] 47 U.S.C. § 151.

[14] 85 FCC 2d at 13.

[15] *Washington Utilities*, *supra* note 2, 513 F.2d at 1157. *See also* AT&T v. FCC, 572 F.2d 17, 26 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 811 (1978); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[16] *See, e.g.*, Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). "In those cases where a rough cost benefit analysis suggests that the costs of continuing to regulate the service offerings of any carrier or class of carriers by means of the prevailing tariff, entry, and exit rules exceed the benefits of applying them, even though some benefits may be

change telecommunications services in many areas. Then, after the introduction of competition, AT&T dominated the provision of these services. Major developments in the competition facing AT&T and conditions which may affect this competition have led to this look into the future of our regulation of AT&T. Four types of developments will be noted in this section: regulatory approval of entry by new competitors; the MFJ; greater reliance on market forces to promote the public interest regarding the rates and facilities of many carriers; and requirement of equal interconnection arrangements and access charges. A brief summary of these developments follows. The impacts of some of these developments and other changes are currently uncertain. Nevertheless, we believe it is appropriate to begin the public discussion on future regulation of AT&T in light of these developments.

8. During the past fifteen years, the Commission and courts approved entry by new private and common carriers into a wide range of services, technologies, and facilities arrangements.[17] New domestic carriers provide switched as well as private line services for voice, data, facsimile, record, and video transmissions. Carriers with their own facilities may have costs similar to or even lower than AT&T's for certain interexchange transmissions.[18] Carriers that resell AT&T's services typically engage in arbitrage, often by leasing private lines from AT&T and selling use of these lines for public switched services (like MTS). While the rates charged by resale carriers are influenced by AT&T's rates and rate structures, the existence of resale carriers decreases AT&T's ability profitably to charge disparate rates for services which are close supply substitutes. Many of AT&T's new rivals have been able to expand their facilities and revenues rapidly, though they are still far smaller than AT&T.[19] Regulatory prohibition of limitations by AT&T on resale of and interconnection to certain of its facilities for interstate, domestic services have sped the entry and expansion of AT&T's rivals in many areas of the United States.

9. Another major development is the MFJ, entered into by the U.S. Department of Justice and AT&T and approved by Judge

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apparent because, for example, of limited power over price, we may be well able to dispense with such regulation." *Competitive Carrier Rulemaking, supra* note 6, 85 FCC 2d at 3.

[17] *See* notes 2 and 3 *supra.*

[18] *Competitive Carrier Rulemaking, supra* note 6, 85 FCC 2d at 26–27 (noting the possible cost advantage of satellite carriers over terrestrial carriers for certain transmissions).

[19] *See* AT&T Petition for Further Rulemaking, *supra* note 7, at 9 (the FCC approved increases in satellite carriers from 4 to 11, in satellites from 17 to 38, and in transponders from 300 to 918 between 1982 and 1987); *Competitive Carrier Rulemaking, supra* note 6, FCC 83–481 at 26 n. 69 (revenues for various carriers in 1982); *id.* at 14 n. 33 (facilities of specialized common carriers valued at $1.4 billion in 1982).

Harold Greene in 1982. The MFJ was intended in part to foster competition in interexchange services by changing the conditions under which AT&T and its rivals provide interexchange services. The principal change is the divestiture of the Bell Operating Companies' exchange operations from AT&T's interexchange operations. The basic economic logic of the MFJ is that divesting the exchange telephone monopolies removes AT&T's ability to use leverage to exclude competition in interexchange services. The BOCs are required to develop non-discriminatory access charges, interconnection arrangements, and planning activities with regard to all interexchange carriers.[20] The new exchange areas or LATAs were established, *inter alia*, to be of sufficient size to attract several interexchange carriers for inter-LATA traffic in competition with AT&T.[21] The MFJ's changes will not begin until January 1, 1984, and what their actual impacts on interexchange competition will be are as yet uncertain. But, Judge Greene stated his expectation that after divestiture competitive entry in interexchange telecommunications is likely to increase and AT&T should be unable to engage in monopoly pricing in any market.[22] Another change brought about by the MFJ is that AT&T is free of the restrictions of its 1956 consent decree regarding engaging in non-telecommunications activities.

10. As a third development, in two major rulemaking proceedings the Commission approved greater reliance on market forces to promote the public interest regarding many rates and facilities. In *Second Computer Inquiry*, the Commission decided that enhanced services can be provided on an unregulated basis, which AT&T is doing through a separate subsidiary. The independent telephone companies and other firms can offer unregulated enhanced services without structural separation. The same conditions apply to the unregulated offering of customer-premises equipment. The decision to allow telephone common carriers, including AT&T via a separate subsidiary, to offer enhanced services and customer-premises equipment on an unregulated basis depended on our findings that, because of competition, they could not charge unjust or unreasonable rates for these offerings.[23] In *Competitive Carrier Rulemaking*, the Commission decided to forbear from requiring tariffs and facilities applications from resale carriers and specialized common carriers, and to streamline regulation of the rates and facilities of other non-dominant carriers, including domsats. Non-dominant carriers can

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[20] United States v AT&T, *supra* note 1, 552 F.Supp. at 165; United States v. Western Electric Co., (1983–1) Trade Cas. (CCH) para. 65,333, at 69,980 (D.C. 1983). *See generally* Lavey & Carlton, ***Economic Goals and Remedies of the AT&T Modified Final Judgment***, 71 Georgetown L.J. 1497 (1983).

[21] United States v. Western Electric Co, *supra* note 20, at 69,980 n. 27.

[22] United States v. AT&T, *supra* note 1, 552 F.Supp. at 172.

[23] *Second Computer Inquiry*, *supra* note 5, 77 FCC 2d at 433 (the market for enhanced services is "truly competitive"), 440 (competition in CPE).

change their rates by filing a notice fourteen days in advance without extensive cost support and can add new channels of communication to their previously-authorized facilities without Commission approval. The decreased regulatory burden on nondominant carriers confers the advantage on them of greater flexibility and lower regulatory costs in their competition against AT&T. Though AT&T has petitioned for streamlined regulation of some of its services in the *Competitive Carrier* docket,[24] we have delayed acting on those petitions relating to domestic offerings pending the information we hope to acquire from this Inquiry.

11. A fourth major development in competitive conditions for interexchange services is our decision on access charges in *MTS/WATS Market Structure*. This proceeding addressed, in part, the disparities that existed in payments for use of exchange facilities by interexchange carriers and in their interconnection arrangements. Typically, AT&T's MTS and WATS services paid more for use of exchange facilities than did the services of carriers covered by the ENFIA agreement,[25] and AT&T's services received superior interconnection arrangements. These disparities may have distorted competition between AT&T and other interexchange carriers. The Commission ordered the development of equal access charges and equally-available, unbundled interconnection arrangements for all interexchange carriers, with a premium access charge imposed on AT&T while it enjoys superior interconnection arrangements. Equal access charges and interconnection arrangements are intended to promote efficiency in the choice of telecommunications carriers, services, and facilities. Again, the transition to equal access charges will not begin until 1984, and what their actual impacts on interexchange competition will be during and after the transition are as yet uncertain.

III. *Present Regulatory Scrutiny of AT&T*

12. This section on present regulatory scrutiny of AT&T has two parts, rates and facilities. The discussion provides background for the exploration of options and does not attempt to provide a comprehensive description of the Commission's current regulation of AT&T's rates and facilities. Clearly, this discussion does not encompass the Commission's entire regulatory scrutiny of AT&T; our current regulatory scrutiny of AT&T includes complaint investigations and duty-to-serve and interconnection requirements. We solicit comments on the regulatory goals and problems identified in this section, as well as on other aspects of our present regulation of AT&T. Comments assessing the costs and benefits of our present

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[24] *See* note 7 *supra*.

[25] *See* MCI Telecommunications Corp. v. FCC, 712 F.2d 517 D.C. Cir. 1983); Exchange Network Facilities for Interstate Access, 90 FCC 2d 6 (1982).

regulatory scrutiny of AT&T would be helpful. For purposes of such comments, we set a relevant time frame as 1984 through 1990.

A. Rates

13. Section 201(b) declares unlawful all unjust or unreasonable charges; Section 202(a) declares unlawful all unjust or unreasonable discrimination in charges; and Section 205(a) empowers the Commission to determine and prescribe what will be the just and reasonable charges.[26] The goals of the Commission's rate regulation are to protect consumers against monopolistic or discriminatory charges while permitting the carrier to earn a fair return.[27] In addition, rate regulation has attempted to prevent implementation of non-compensatory rates to protect consumers using a carrier's other services from having to bear cross-subsidies and to protect competition from predatory practices which may lead to consumers facing monopolistic charges.[28] Two aspects of our present regulatory scrutiny of AT&T's tariffs will be discussed in this section, (1) cost justification, and (2) bundling of rate elements within a rate structure and other practices which restrain resale and interconnect competition and discriminate among customers.

14. One aspect of our present regulatory scrutiny of AT&T's rates involves determination of AT&T's rate base and expenses for each basic service and the appropriate rate of return for all its regulated services. We have not found these tasks to be simple. For example, in *AT&T: Manual and Procedures for the Allocation of Costs*, we noted the lack of a proper and manageable methodology for the allocation of investment and expenses to AT&T's individual services or service elements.[29] We lack the data, accounting procedures, and resources to detect all cross-subsidies in AT&T's tariffs. The difficulties of implementing a detailed cost allocation are attributable to, *inter alia*, AT&T's plant provisioning process, the fungibility of its plant and services, and our belief that the public interest is served by permitting AT&T to utilize efficiently its facilities for multiple services and to respond quickly to demands in the marketplace. Nevertheless, we have found major AT&T tariffs

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[26] 47 U.S.C. §§ 201(b), 202(a), 205(a).

[27] *See, e.g.*, FPC v. Hope Natural Gas Co., 320 U.S. 591, 602–05 (1944); AT&T (Docket No. 19129), 38 FCC 2d 213, 226 (1972); AT&T: Private Line Rate Structure and Volume Discount Practices, *supra* note 11.

[28] *See, e.g.*, Hi-Lo Designation Order, 44 FCC 2d 697, 699–700 (1974) (concern that rate revisions could affect the implementation of our policy of "full and fair competition among and between existing and new carriers"); American Satellite Corp., 55 FCC 2d 1092 (1977).

[29] 84 FCC 2d at 397. The Interim Cost Allocation (ICAM) was designed to allocate costs between AT&T's MTS, WATS, private line, and ENFIA services. *See also* Comptroller General, *supra* note 12, at 90 (weakness of Commission's Uniform System of Accounts).

unlawful based principally on AT&T's failure to justify their rate levels and rate structures with appropriate cost data.[30] Our scrutiny of cost allocations in such cases may have prevented implementation of monopolistic, predatory, or discriminatory rates.[31] On the other hand, we have observed that "traditionally, the stumbling block to our prescription of rates for AT&T's service offerings has been our inability to obtain the cost information needed to determine just and reasonable rates under Section 205 of the Act."[32]

15. Another complication in our scrutiny of the cost basis for AT&T's rates is the derivation of the appropriate rate of return for AT&T. In *AT&T: Petition for Modification of Prescribed Rate of Return*[33], we noted the difficulties inherent in analyzing AT&T's financial structure for interstate cost-of-capital weighting purposes; AT&T uses interchangeable funds derived from its interstate, intrastate, and unregulated activities in providing its various services and products. While these difficulties may be eased by divestiture, they are exacerbated by the expansion of AT&T's unregulated activities under *Second Computer Inquiry* and the MFJ despite structural separation. Under present procedures, adjustment of AT&T's authorized rate of return is a lengthy and costly process. During periods of volatile economic and financial conditions, it cannot be expected that the prescribed rate of return will yield just and reasonable prices, or that the carrier's prices will result in earnings by category of service that exactly yield the prescribed rate of return.[34] Furthermore, we require that AT&T target its rates so as to earn its prescribed rate of return for interstate operations on each of the three basic ICAM service categories.[35] Consequently, AT&T must perform traffic forecasts to justify its rates, with traffic depending *inter alia* on volatile economic and financial conditions.

16. It is expensive and time consuming for AT&T to prepare cost-

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[30] *See, e.g.*, Hi-Lo Final Decision, 58 FCC 2d 362, 366–67 (1976); Dataphone Digital Service, 62 FCC 2d 774 (1977); WATS Rejection Order, 66 FCC 2d 9 (1977), *remanded sub nom.* MCI v. FCC, 627 F.2d 322 (D.C. Cir. 1980); Series 7000, 67 FCC 2d 1134 (1978), *aff'd sub nom. ABC v. FCC*, 663 F.2d 133 (D.C. Cir. 1980); AT&T: Charges for Private Line Services (MPL), 74 FCC 2d 1, 31 (1979); AT&T: Audiographics Teleconference Service, Transmittal No. 14316 (released Oct. 5, 1983).

[31] "This brings us to the issue of AT&T's cost justification. In this regard, we have previously examined the satellite applications of monopoly carriers to ensure that ratepayers do not subsidize an unneeded and underutilized competitive facility. [*Citing*Communications Satellite Corp, 69 FCC 2d 1466 (1978); and GTE Satellite Corp, 43 FCC 2d 1143 (1973).] . . . [W]e question whether AT&T has considered all factors in assigning transponder costs to [this] service." AT&T: Satellite-Based Private Data Service Offering, 89 FCC 2d 1116, 1123 (1982).

[32] AT&T: Charges for Private Line Services, *supra* note 30, 74 FCC 2d at 41.

[33] 86 FCC 2d 221, 228 (1981).

[34] *Id.* at 250.

[35] AT&T: Equalization Filing, 89 FCC 2d 1000 (1982); note 29 *supra.*

justified rate filings and requests for changes in its authorized rate of return. So too is it expensive and time consuming for the Commission to examine them. We are concerned that present practices may provide AT&T with incentives for inefficiency in its investments and operations, and for rigidity in its rates, rate structures, and service offerings.[36] In at least some ways, our scrutiny of AT&T's rates and earnings may result in telecommunications users paying higher prices than, and receiving services that do not satisfy their demands as well as, offerings under less burdensome regulation. We have been reluctant to waive fully the requirement that AT&T file cost justifications. Yet, the Common Carrier Bureau recently observed that the Commission has attempted to develop and interpret the economic-support rules in 47 C.F.R. § 61.38 (1982) in a flexible manner.[37] The rules do not require AT&T or other carriers to provide voluminous or detailed information as long as the cost submission is sufficient for review purposes in a particular case. AT&T was encouraged to utilize innovative methodologies, such as comparability studies, so that the Commission can pursue sufficient tariff while saving time and expense for all concerned. Also, in light of the Commission's proposal to shorten tariff notice periods for all dominant carriers including AT&T,[38] the Bureau stated its willingness to entertain requests for waivers from AT&T seeking 45 and 35 day notice periods in lieu of the normal 90 and 70 day periods. Finally, our scrutiny of AT&T's rates and earnings may in some instances impose on AT&T a competitive disadvantage and might be unnecessarily burdensome where AT&T faces substantial competition. In *Competitive Carrier Rulemaking,* we removed the requirement of extensive support data for tariffs and rate-of-return review from most of AT&T's competitors by forbearance or streamlined regulation, 47 C.F.R. § 61.39.

17. Another aspect of our present regulatory scrutiny of AT&T's tariffs is our pressure on AT&T to unbundle its rate structures and utilize consistent pricing. Making AT&T's services and facilities available on a disaggregated basis would decrease discrimination among customers (market segmentation), foster a more competitive marketplace through expanded interconnection and resale opportu-

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[36] *See, e.g.,* Averch & Johnson, *Behavior of the Firm Under Regulatory Constraint,* 52 Am. Econ. Rev. 1058 (1962); Joskow & Noll, *Regulation in Theory and Practice: An Overview,* in G. Fromm (ed.), Studies in Public Regulation 1 (1981); S. Breyer, Regulation and Its Reform 36–59 (1982).

[37] Action on AT&T Special Permission Requests, Public Notice 3546 (April 11, 1983); Letter from Common Carrier Bureau to AT&T, Ref. No. 61610 (April 8, 1983) (regarding requests for waiver of Sections 61.38 and 61.58 of the Commission's Rules for tariffs for Satellite Digital Circuits, International Voice-Only Private Line Service, and High Speed Switched Digital Service).

[38] Amendment of Sections 1 and 61 of the Commission's Rules, FCC 83–402 (released Oct. 5, 1983).

nity, and increase our ability to examine the cost justification for individual service offerings.[39] For example, in 1981 AT&T filed a tariff to provide a high-speed digital data transmission service to meet the requirements of a single firm.[40] AT&T proposed to offer wide-band, terrestrial T1 carrier links exclusively as part of its satellite-based, end-to-end Series 9000 service. Other potential customers were interested in using these terrestrial facilities but not the end-to-end service; AT&T's Dataphone Digital Service (DDS) tariff did not offer those specific facilities nor the same pricing basis. The bundled tariff would have impaired competition from interconnect carriers and would have deprived DDS customers an opportunity to cut their costs. After Satellite Business Systems petitioned for rejection of the tariff and denial of the associated 214 application, we found that AT&T's offering of the end-to-end service should be preceded by a tariff offering the terrestrial facilities in a reasonable, nondiscriminatory manner. A discrete, cost-based offering of the terrestrial facilities would enhance our ability to evaluate the reasonableness of the rates for individual AT&T service offerings through in-kind comparison with other tariffed services; then, the tariffs themselves would have self-policing attributes which would lessen the need for long and cumbersome rate investigations.[41]

18. By bundling rate elements, AT&T has attempted to offer the same transmission channels under different tariffs and rate structures according to specific uses. We have used the tariff-review process to attempt to prevent this practice and the resulting unreasonable rate discrimination.[42] In addition, we have pressured AT&T to eliminate tariff provisions which have not been justified

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[39] *See* AT&T: Charges for Private Line Services, *supra* note 30, 74 FCC 2d at 274; AT&T: First Satellite-Based Private Data Service Offering, *supra* note 31, 89 FCC 2d at 1122; AT&T: Equalization Filing, *supra* note 35, 89 FCC 2d at 1005; AT&T: Picturephone Meeting Service, 89 FCC 2d 1017, 1024–25 (1982). *See also* Comptroller General, *supra* note 12, at 81–82 (encouraging Commission to continue pursuing non-cost approaches, including less customer segmentation and more arbitrage, to limiting cross-subsidies).

[40] AT&T, Satellite-Based Private Data Service Offering, *supra* note 31, 89 FCC 2d at 1117–22. The firm was R.R. Donnelly and Sons Company.

[41] *Id.* at 1122.

[42] *See* AT&T: Picturephone Meeting Service, *supra* note 39, 89 FCC 2d at 1025 (AT&T could market Picturephone Meeting Service as a separate service with end-to-end capability at a price equal to the sum of separate tariff charges for each component part; AT&T would have to price the transmission elements of PMS the same as it does in the tariff for those elements alone); AT&T: Basic (Bell) Packet Switching Service (BPSS), 91 FCC 2d 1, 16 (1982), FCC 83-221 at 18–19 (released May 26, 1983) (requiring AT&T to eliminate DDS rate structure which gave special treatment to BPSS terminations); AT&T: Audiographics, *supra* note 30 (disaggregating MTS rates in the manner proposed would cause different rates to apply, without any apparent cost justification, to MTS calls depending on whether they were made in the context of Audiographics or as other MTS applications).

and could discourage potential users and competition, such as a twelve-month notice requirement for terminating a service and excessive minimum usage charges.[43] Those types of provisions are especially suspect when they favor AT&T's subsidiary offering enhanced services. Examination of AT&T's tariff for provisions which foster monopolistic, predatory, or discriminatory rates can be a relatively simple process, not requiring extensive analysis of cost data. Yet, together with the market forces of resale and interconnection, this examination can be a powerful tool in ensuring just and reasonable rates.

B. Facilities

19. Section 214 requires carriers to obtain a license from the Commission for construction or use of transmission lines, or for discontinuance of services.[44] The Commission must certify that a construction or use of lines will serve the present or future public convenience and necessity. A discontinuance must be certified as impairing neither the present nor future public convenience and necessity. The legislative history indicates two purposes for these provisions. First, there was the fear that duplicate, unnecessary, or inefficient facilities would inflate a carrier's rate base and lead to higher charges to users of services.[45] Scrutiny under section 214 can be a more economical means of preventing improvident or unduly expensive investments and the resulting increases in rates than the alternative of subsequent disallowance of an expenditure from the rate base. Second, the discontinuance provision was designed to bolster the goal of nationwide availability of adequate service by assuring that carriers do not terminate a service without prior regulatory examination.[46]

20. Again, we have not found regulation of AT&T pursuant to Section 214 to be simple. Section 214 has been a limited tool in controlling AT&T's rate base. Scrutiny under Section 214 has been applied to only a small percentage of AT&T's construction budget, investments categorized as "lines."[47] The largest part of AT&T's rate base has been built over the years without any regulatory scrutiny. Also, the nationwide switched network is complex and plant additions have to be planned by AT&T years in advance on the basis

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[43] AT&T: BPSS, *supra* note 42, FCC 83-221 at 15–18.

[44] 47 U.S.C. § 214.

[45] Section 214 was "designed to prevent useless duplication of facilities, with consequent higher charges upon the users of the service." 78 Cong. Rec. 10314 (1934) (Rep. S. Rayburn, Chairman of the Sponsoring Committee); AT&T, 10 FCC 315, 321 (1944).

[46] 89 Cong. Rec. 785–87 (1943).

[47] *See* AT&T: BPSS, *supra* note 42, 91 FCC 2d at 14 (multiplexing equipment and switching equipment incorporating multiplexing functions subject to Section 214 certification requirement, but no decision to apply Section 214 to pure switching equipment).

of forecasts which may or may not be accurate as to actual needs. We observed in 1977 in Docket No. 19129 that chronic forecasting errors by AT&T led to network underutilization and we directed that Section 214 authorization procedures be used to promote better network construction, management, and utilization.[48] In *Competitive Carrier Rulemaking* we expressed our frustration, under the Section 214 procedures for AT&T in effect in 1979, of reviewing AT&T's construction plans too late in the planning cycle reasonably to require significant changes.[49] We noted the need to expand our review beyond processing numerous facility-by facility applications without regard to their impacts on the overall network. Current procedures involving review of AT&T's annual Blanket Filing incorporate analysis of network utilization and comparisons of forecasted and actually-implemented circuits.[50] We have encouraged AT&T to file more of its Section 214 applications in the annual Blanket filing to give the Commission a more accurate view of proposals for network development in the coming year, allow efficient use of Commission resources, and reduce paperwork.[51] However, we have refused to authorize AT&T to install at some unspecified time in the future multiplexing equipment on previously-authorized channels without specific Section 214 certification.

21. Few Section 214 applications by AT&T are challenged by the Commission or other parties; most are routinely processed without extensive analysis of AT&T's need for the facilities, the efficiency of the design, or the competitiveness of the procurement practice. Some applications are granted expeditiously after AT&T shows that immediate action is necessary and requests special temporary authority. 47 C.F.R. § 63.04. Occasionally, review under Section 214 serves as a tool for us to reflect our concerns about the impacts of AT&T's entry, expansion, and exit in and from facilities and services on various regulatory policies. As an illustration, we rejected AT&T's tariff to offer a basic packet data switching service (BPSS) after complainants asserted that, contrary to *Second Computer Inquiry*, the service would favor AT&T's subsidiary. We required that AT&T obtain Section 214 authorization for the service. Later, we granted AT&T's Section 214 application after finding that, as revised by AT&T, the service would be a satisfactory, nondiscriminatory common carrier offering.[52] Furthermore, we conditioned Section 214 certifications for AT&T's satellite-based private data service

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[48] AT&T: Charges for Interstate Telephone Services (Docket No. 19129, Phase II), 64 FCC 2d 1, 51–52 (1977).

[49] 77 FCC 2d at 344–47.

[50] AT&T, W-P-C-5010 (pending).

[51] The total construction cost for the facilities associated with the 1983 Blanket filing is estimated at only $73.6 million. *Id.*

[52] AT&T: BPSS, *supra* note 42.

offering and Picturephone Meeting Service on certain tariff filings by AT&T to prevent discrimination.[53]

22. Section 214 certification procedures can be abused by AT&T's competitors to delay or block entry of AT&T's innovative and useful services.[54] In addition, the exit (discontinuance) constraints of Section 214 may impose substantial losses on a carrier after competitive circumstances make a service uneconomic, thereby deterring potential entry.

23. Aside from the operational problems with applying our present regulatory scrutiny of AT&T's facilities, we are concerned about the effects of these practices in imposing a competitive disadvantage on AT&T. Our orders in *Competitive Carrier Rulemaking* lifted much of the burden of obtaining approval for entry, expansion, and exit from most of AT&T's rivals by forbearance or streamlined regulation, 47 C.F.R. §§ 63.07, 63.71. The costs and benefits of the present regulatory scrutiny of AT&T must be reexamined in light of the growing competition facing AT&T and the disparity in regulatory burdens. Also, the divestiture and injunctive provisions of the MFJ may decrease the need to explore through the Section 214 certification process concerns about the possible impacts on certain policies of AT&T's activities.

IV. *Possible Options For Alternative Regulation of AT&T*

A. Legal Analysis

24. A brief legal analysis of our authority to modify our regulation of rates and facilities will be stated here. In general, we believe we have a duty to refrain from imposing unnecessary regulatory burdens on carriers. *See Further Notice in Competitive Carrier Rulemaking, supra* note 6, 84 FCC 2d at 455; *Home Box Office v. FCC,* 567 F.2d 209 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977); *Geller v. FCC,* 610 F.2d 973 (D.C. Cir. 1979). The Commission has discretion in choosing which regulatory tools will be most effective in promoting the public interest. *Computer and Communications Industry Ass'n v. FCC,* 693 F.2d 198, 212 (D.C. Cir. 1982), *cert. denied,* 103 S. Ct. 2109 (1983); *Western Union Telegraph Co. v. FCC,* 674 F.2d 160, 165–66 (2d Cir. 1982); *Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282 (D.C. Cir. 1966). We solicit comments on the applicability of the following analysis to our regulation of AT&T. We also seek comments on our flexibility under the Communications Act in other regulation of AT&T.

1. Rates

25. In meeting the statutory standard of just and reasonable

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[53] *See* notes 31, 39 *supra.*

[54] *Competitive Carrier Rulemaking, supra* note 6, 84 FCC 2d at 490.

rates, it is the result reached and not the method employed which controls. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1943). The Commission is not limited to specific formulae or methods to achieve rates which fall in the "zone of reasonableness." *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 516–17 (1979). "[T]he Commission has broad discretion in selecting methods for the exercise of its power to make and oversee rates" and the question for appellate review is "whether the FCC made a reasonable selection from the available alternatives." *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980). *cert. denied*, 451 U.S. 920 (1981). Market forces can check rates which would be unlawful under the Communications Act. *United States v. FCC*, 652 F. 2d 72, 104 (D.C. Cir. 1980). When a carrier faces substantial competition, its rates should meet the Commission's standard of reasonableness; it would not be profit maximizing for them to be monopolistic (above cost—potential customers will turn to alternative suppliers), predatory (below cost—the carrier cannot drive and keep its rivals out of the market and recoup its lost profits), or discriminatory (customers facing high discriminatory prices will turn to alternative suppliers, including arbitrageurs (resellers)). In *Competitive Carrier Rulemaking*, we held that we have the authority to presume lawful rates filed by carriers lacking market power[55], relying on the complaint process and market forces to ensure just and reasonable rates.

26. Even if AT&T possesses market power, we are not tied to relying on repeated detailed investigations into service-specific cost allocations and the appropriate rate of return for AT&T's basic interstate services. Administrative agencies have the authority to adapt their rules and practices to the demands of changing circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 811 (1978). During times of variable economic and financial conditions affecting operating and capital costs and demand, the long delays inherent in present methods of supporting tariffs through cost allocations and determining a reasonable rate of return may be contrary to the public interest. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 113, (1958) (Utilities "should not be precluded from increasing the prices of their product whenever that is the necessary means of keeping the intake and outgo of their revenues in proper balance. . . ."). For periods of several months or longer, under the current cost-justification approach AT&T may be stuck with rates yielding an unfairly low rate of return, or we may be unable to adjust rates so as to prevent AT&T from earning unfairly high profits. Appropriate formulae to justify rate changes may include use of cost or demand indices which

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[55] 85 FCC 2d at 30–38. The concept of market power will be discussed in Section VI *infra*.

can be developed and reviewed more quickly than present supporting data. A formula could be developed and applied to update readily AT&T's authorized rate of return on a regular basis. Estimates of cost-based changes using indices may fall within the category of "pragmatic adjustments called for by particular circumstances" to achieve rates within the "zone of reasonableness." *Permian Basin, supra,* 390 U.S. at 777, 797.

27. Our policy of permitting resale arbitrage should curtail opportunities for unreasonable discrimination in rates; opportunities for monopoly pricing also should decline. *AT&T v. FCC,* 572 F.2d 17, 23 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978). Absent tariff impediments to arbitrage and interconnection, resellers have no capacity limitations in their use of one AT&T service to compete with another AT&T service. The availability of this market check on AT&T's rate structure may make some streamlining of our scrutiny of cost allocations and discrimination possible.

2. Facilities

28. The Commission has considerable discretion in determining whether the construction, acquisition, or use of lines, or the discontinuance of a service promotes the public interest under Section 214. *FCC v. RCA Communications,* 346 U.S. 86, 90 (1953). There are no procedural requirements under Section 214(a). *ITT World Communications v. FCC,* 595 F.2d 897, 900 (2d Cir. 1979). Nor does Section 214 specify the amount or type of information to be obtained from applicants.

29. Our rules require less comprehensive facilities information for small projects and, in some cases, provide for continuing authority to supplement existing facilities upon notification only. *See* 47 C.F.R. §§ 63.02, 63.03, 63.07. In *Competitive Carrier Rulemaking,* we noted that non-dominant carriers, whose rates are governed by market competition, lack the incentive to overinvest because they cannot charge supracompetitive rates to cover an inflated rate base. Also, the existence of actual and potential substitutes for the services of non-dominant carriers ensures that discontinuing any of their services would not endanger the availability of adequate telephone service. 85 FCC 2d at 39–49. We found that our statutory purposes are promoted by granting non-dominant carriers broad initial certification and allowing them simply to report semi-annually on their circuits added on previously-authorized facilities. *See* 47 C.F.R. § 63.07(e).

30. Even if AT&T possesses market power, the statutory purposes underlying Section 214 may be best promoted by overseeing the development of AT&T's comprehensive network rather than focusing on circuit-by-circuit additions. Recently, we decided simply to monitor AT&T's activation of circuits on the ANZCAN cable, an

action not involving major new investments, without requiring prior approval for activation.[56] Also, though domsats were treated as dominant in our First Report in *Competitive Carrier Rulemaking*, we concluded there that domsats did not require authorization for use of each channel of a previously-reviewed satellite or earth station; channel-specific authorizations could delay or inhibit satellite service to customers without any benefits.[57]

B. Options

31. This section discusses some possible options for alternative regulation of AT&T's domestic rates and facilities. The section concludes with an analysis of the possible application of an option to only some of AT&T's services rather than to the entire carrier for a period of time. We solicit comments on these options as well as others. The next section will focus on the conditions under which we could pursue each option. Note that the listing of any option here does not mean that the Commission views the option as a desirable alternative to present regulatory scrutiny under current market conditions.

1. Rates

32. The options discussed in paragraphs 33–35 assume that the Commission will continue to review AT&T's tariffs for unjustified bundling of rate elements and other practices which restrain resale and interconnect competition and discriminate among customers. Resale and interconnect competition are important market forces on which a decision to lessen regulatory scrutiny of other aspects of AT&T's tariffs may depend. Analysis of tariffs for bundling and other restrictive provisions and practices might be done without requiring AT&T to file or the Commission to examine extensive support data. Paragraphs 33–35 deal with alternatives to our scrutiny of cost justification. Paragraph 36 discusses further deregulatory options.

33. To limit the burden of cost justification, cost and construction indices might be developed to adjust the revenue requirement for a particular service—its rate base, rate of return, and expenses. Cost indices could be correlated to rate elements in tariff structures. Demand indices then would be applied to calculate a reasonable rate for the service. A formula for AT&T's authorized rate of return may involve financial indicators such as the average rate over a given period for U.S. Treasury bills of a given maturity. Use of indices would help keep rates just and reasonable in the face of variable economic and financial conditions. They also would reduce the need

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[56] AT&T: ANZCAN Cable, FCC 83T-10 (released June 23, 1983).

[57] 85 FCC 2d at 46.

for undertaking expensive and time-consuming cost justification analysis, thereby decreasing the burden on AT&T and the Commission.[58] More extensive cost and rate-of-return studies could be required, if neccessary, and the Commission could investigate the lawfulness of index-adjusted rates.

34. To give AT&T more rate flexibility without increasing the frequency of cost-justified tariff filings, AT&T might file a tariff with a zone of reasonableness for a service's rate and a cost justification for the zone.[59] A tariff with a zone of reasonableness could be filed for a group of services, such as MTS service over a range of distances and over a range of origin-destination pairs. Or the zone could apply to a single service over time. As under current practices, we would allow a proposed zone to go into effect, suspend or reject it, or prescribe a zone. Such zones could be combined with a prescribed overall rate of return which we would monitor.

35. Another option is to adopt for AT&T the streamlining treatment in *Competitive Carrier Rulemaking*.[60] Generally, reliance would be placed on market forces, including competition from resellers and other facilities-based carriers and demand substitutability across AT&T's services, rather than accounting scrutiny to ensure that each of AT&T's rates is cost justified. We decided that non-dominant carriers can file tariffs without cost justification on fourteen-days notice. AT&T's tariffs might be considered *prima facie* cost justified, but would be examined during the notice period for bundling and other restrictive provisions and practices. We can require a non-dominant carrier to submit supporting data, extend the tariff's effective date, suspend or reject it, or later investigate it on receipt of a complaint or on our own initiative. A party requesting suspension has the burden of a four-part showing: (1) there is a high probability that the tariff would be found unlawful after an investigation; (2) the alleged harm to competition outweighs the injury to consumers from the unavailability of the service at the tariff's rates and conditions; (3) failure to suspend would cause irreparable injury; and (4) suspension would not otherwise be contrary to the public interest. These carriers' rates of return are

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[58] *See* Comptroller General, *supra* note 12, at 55 (automatic rate adjustment clauses make it easier for utilities to deal with inflation and require regulators to conduct fewer rate hearings). The Staggers Rail Act of 1980 provides for use of cost indices in establishing the reasonableness of rail rates. 49 U.S.C. § 10707a (1982).

[59] In J. Meyer, *et al.*, The Economics of Competition in the Telecommunications Industry 309 (1979), the authors recommend that "minimum rate regulation should be largely or completely abolished" and "maximum rate regulation should be greatly relaxed and made more flexible by gearing it to a zone of reasonableness within which automatic increases in rates can be made, with a cap geared loosely to general price changes in the economy." The Staggers Rail Act of 1980 provides for zones of rail carrier rate flexibility. 49 U.S.C. § 10707a (1982).

[60] 85 FCC 2d at 52; 47 C.F.R. § 61.39. *See also* 49 U.S.C. § 10709 (1982) (determination of market non-dominance in rail carrier rate proceedings).

neither prescribed nor monitored. A variant on this alternative would be for us to prescribe an overall rate of return for AT&T's regulated services and monitor its earnings on all those services; this process would not require service-specific cost allocations, except as between regulated and unregulated services.

36. If we pursue the forbearance treatment in *Competitive Carrier Rulemaking*[61] for AT&T, AT&T would not be required to file tariffs or report its rate of return. However, requiring AT&T to file tariffs may serve our statutory purposes in two ways. First, we can scrutinize tariffs for provisions or practices that restrict resale or interconnection, are discriminatory, or entail bundling. This scrutiny can supplement market forces and help ensure that rates are just and reasonable even if we do not undertake analysis of AT&T's costs and rates of return. Second, public tariffs can increase the ability of a competing carrier or customer to bring a successful complaint against AT&T to the Commission for unjust or unreasonable rates or for failure to serve or interconnect. Similarly, public tariffs can aid a potential plaintiff in bringing an antitrust case against AT&T for predatory pricing or practices or for denial of essential facilities.[62] Requiring that tariffs be filed in a certain format and with certain charges and service elements identified can facilitate the checks provided by the complaint process and antitrust enforcement. The availability of public tariffs together with our complaint process and antitrust enforcement may make it unneccessary for us to scrutinize tariffs for bundling and other restrictive or discriminatory provisions or practices. Under this approach, we could investigate a rate on receipt of a complaint or on our own initiative.

2. Facilities

37. Three alternative regulatory approaches to AT&T's facilities will be noted. First, we can expand the scope of projects covered by 47 C.F.R. §§ 63.02 and 63.03. Section 63.02 covers applications for extensions of service into domestic territory at present not directly served by the applicant through the construction, acquisition, or operation of facilities not costing the applicant in excess of $50,000 or with an annual rental not exceeding $10,000. Such applications may omit much of the information normally filed pursuant to 47 C.F.R. §63.01; at minimum, the application under Section 63.02 shall contain a general description of the existing and proposed facilities, points of service, and costs. Expanding the coverage of this approach, we could drop some of the information AT&T currently must file in most of its 214 filings, with limitations on the cost or types of

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[61] 91 FCC 2d at 71.

[62] *See, e.g.,* United States v. AT&T, 524 F.Supp. 1336, 1360–61 (D.D.C. 1981); United States v. Terminal R.R. Ass'n, 224 U.S. 383, 411 (1912); Hecht v. Pro-Football Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977).

facilities covered by this procedure. Section 63.03 covers, *inter alia*, applications for domestic channels that supplement existing facilities where the construction or acquisition cost does not exceed $500,000 or where the annual rental does not exceed $100,000, where the points of service were previously authorized to the applicant for the type of service involved, and where the transmission facilities involved were previously authorized. When filed with the necessary information, such applications shall be deemed to have been authorized by the Commission on the 21st day after filing unless the Commission notifies the applicant to the contrary. Section 63.03 also provides for continuing authority for small projects involving supplementing existing facilities. This approach may lead us to expand the projects that would be deemed authorized on the 21st day after filing an application unless AT&T is otherwise notified, again with possible limitations on the facilities qualifying for this treatment.

38. A second option for revision of regulating AT&T under Section 214 follows the streamlining approach in *Competitive Carrier Rulemaking*.[63] Under this approach, non-dominant carriers generally receive initial authorization to serve any domestic points, and report to the Commission semi-annually on the installation or lease of additional circuits over previously-authorized transmission media. This approach provides for reporting of construction costs of the facilities involved. Regarding discontinuance of services by non-dominant carriers, this Order provides that these carriers shall notify all customers affected by the planned discontinuance that the Commission normally authorizes such discontinuance. Customers can file comments with the Commission within fifteen days of the notification. The carrier then files with the Commission an application to discontinue service, which is automatically granted on the 31st day after its filing unless the Commission has notified the carrier that the application is denied.

39. Another option follows the forbearance approach in *Competitive Carrier Rulemaking*.[64] Carriers subject to this approach are not required to file any information under Section 214. Market forces are relied on to check overbuilding; a carrier facing substantial competition cannot charge supracompetitive prices to cover improvident or inefficient investments. The availability of alternative suppliers is relied on to check harms to universal service from discontinuance of a service. A variant on this approach involves using the discontinuance procedure described in paragraph 38 *supra* if there are other potential suppliers to check overbuilding by AT&T but AT&T's exit may leave no actual supplier for some time period.

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[63] 85 FCC 2d at 53–55; 47 C.F.R. §§ 63.07, 63.71; FCC 83-481, at 26–27.

[64] 91 FCC at 71–72.

3. Selective Application of Alternatives

40. Each of the preceding options for regulation of AT&T's rates and facilities could be applied to all of AT&T's domestic services and facilities in all of the areas it serves simultaneously. On the other hand, our evaluation of market conditions may make some specific domestic services, facilities, and areas more attractive than others for application of an alternative at a particular time. As examples, AT&T filed separate pleadings for streamlined regulation of the resale services of its separate subsidiary and its specialized satellite services.[65] AT&T's enhanced services have already been deregulated, pursuant to *Second Computer Inquiry*, subject to the requirement of a separate subsidiary.

41. Regarding rate-regulation alternatives, several considerations bear on choosing services for application of less stringent regulatory alternatives. First, there may be limited opportunities for cost shifting from some candidates for less stringent rate regulation to more heavily regulated services, such as the services provided by AT&T's separate subsidiary. A possible problem with selective application of an alternative is that it may require an allocation of costs between services for which cost-justified tariffs are desired and services subject to an alternative approach to regulating rates. Shared facilities not only complicate cost allocations, but also make it difficult to identify the facilities associated with a particular service for different regulatory treatment under Section 214. Cost shifting toward some services would inflate the rate base of the services and, possibly, harm consumers because of higher rates for the services. Next, potential customers of some candidates for decreased rate regulation may have abundant close actual and potential substitutes. Abundant close substitutes reduce the likelihood that AT&T would engage in monopolistic, predatory, or discriminatory pricing or practices. According to AT&T's Petition for Further Rulemaking, AT&T's specialized satellite services have this characteristic.[66] It would be difficult for AT&T to engage in predation or discrimination in a service subject to easy resale and interconnection and offered on an unbundled basis. Note that a heavily regulated service of AT&T may serve as a close substitute for one of its services subject to a rate-regulation alternative. Third,

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[65] *See* note 7 *supra*. The Staggers Rail Act of 1980 provides for the determination of market non-dominance in rate proceedings for particular services of a rail carrier. 49 U.S.C. § 10709 (1982). Comments describing how this provision has worked for rail carriers or similar regulatory efforts may be helpful in our analysis of selective application of regulatory alternatives for AT&T.

[66] *Supra* note 7, at 5 ("specialized satellite services are subject to a high degree of actual and potential competition, entry barriers are low, existing carriers can expand or re-deploy their assets rapidly to take advantage of market opportunities, and transponder and earth station facilities are widely available and dispersed among many suppliers").

services on which AT&T's competitors are not heavily dependent may be good candidates for selective application of rate-regulation alternatives. Finally, it may be desirable that services subject to early streamlined rate regulation have relatively small revenues so that any harmful impact on consumers and competition would be small.

42. Similarly, several considerations bearing on the choice of facilities and services for application of less stringent regulation under Section 214 can be identified. First, low-cost facilities involve less risk of inflating rate base. Next, AT&T is unlikely to overbuild facilities that will increase its rate base for services having abundant close substitutes. Nor would discrimination in services with abundant close substitutes impair the public interest. Third, it is unlikely that approval of facilities associated with a service subject to easy resale and interconnection and offered on an unbundled basis would have to be conditioned to protect the public interest.

43. While placing AT&T's unregulated services under a separate subsidiary with separate facilities, personnel, and books of account could decrease opportunities for cost shifting, such separation can create inefficiencies through lost economies of scale and scope. We seek comments on whether we should condition less stringent rate and facilities regulation on structural separation from more heavily regulated services and facilities, and, if not, what accounting procedures should be developed to maintain the integrity of the more regulated services.

44. Pursuant to our decision in *Second Computer Inquiry*, AT&T formed a fully-separated subsidiary to provide unregulated enhanced services and customer-premises equipment (CPE). 77 FCC 2d at 474. We stated in that decision that these unregulated activities should be separated from the provision of basic transmission services to lessen the potential that users of AT&T's basic services will be subsidizing AT&T's unregulated activities. This subsidiary is not allowed to own transmission facilities nor to provide common carrier services. We seek comments on two issues which may arise. First, as we noted in *Competitive Carrier Rulemaking*,[67] we need to consider whether we might authorize this subsidiary to provide basic resale services treated by forbearance. If so, we might review AT&T's tariffs for the underlying services that are resold to ensure that the services are general and not tailored or with preferences for its subsidiary. Second, AT&T may seek to supply non-telecommunications products and services. Because the restrictions on AT&T's non-telecommunications activities of the 1956 consent decree are lifted by the MFJ, AT&T is not confined to supplying basic services,

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[67] *Supra* note 6, FCC 83-69, at 8 n. 17. In the *Fourth Report, supra* note 6, FCC 83-481, at 28, we authorized resale affiliates of exchange telephone companies to be treated by forbearance for their domestic, interstate services.

enhanced services, and CPE, the categories discussed in *Second Computer Inquiry*. Should AT&T be allowed to engage in these unregulated activities (1) through its corporate component providing regulated basic services, (2) through its subsidiary formed pursuant to *Second Computer Inquiry*, or (3) only through a new, fully-separated subsidiary? What accounting practices, if any, should be required if the first option is pursued?

V. *Conditions Under Which Alternative Regulation Would Be Desirable*

45. This section requests comments on the conditions under which options for alternative regulation of AT&T would be desirable. We discuss three types of conditions which may signal the appropriateness of a transition from present regulatory scrutiny of AT&T to a specific option. Comments are invited on the desirability of specific options under these types of conditions and others, what information we need to evaluate these conditions, and how we shall obtain that information.

46. First, some options may be more effective than present regulatory scrutiny regardless of market developments. For example, we have recently proposed to shorten tariff notice periods for all dominant carriers, including AT&T.[68] This action will enhance AT&T's ability to respond to quickly changing market conditions without compromising our review functions. Also, we have stated our desire to revise our practices under Section 214 for dominant carriers to increase the effectiveness of our review.[69] Some options may be desirable regardless of market developments because they improve the effectiveness of our regulatory review of AT&T. Other options may be desirable because their costs and benefits are better than those of present scrutiny.

47. Second, the occurrence of specific events may make various options more desirable than they are currently. Such events may include implementation of equal interconnections and access charges, completion of a revised Uniform Systems of Accounts, or a decision in a possible rulemaking addressing MTS/WATS rate restructuring.

48. Third, certain options may be undesirable if AT&T possesses substantial market power. Implementation of the alternative regulatory practices in *Competitive Carrier Rulemaking* was limited to carriers lacking market power. It may be that we can look to market forces to check all of AT&T's rates and, thereby, its facilities decisions only if AT&T lacks market power in all of its services. However, given continued regulation of some of AT&T's services and

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[68] Amendment of Sections 1 and 61 of the Commission's Rules, *supra* note 38.

[69] *Competitive Carrier Rulemaking, supra* note 6, 85 FCC 2d at 39.

competition, it may be that AT&T lacks market power in other services. For example, potential customers of one AT&T service could use another, heavily regulated AT&T service or a service provided by one of AT&T's competitors. A combination of market forces and regulation of some of AT&T's services may make it desirable to implement alternative regulation of other AT&T services before AT&T lacks market power in all of its services. For example, suppose that AT&T possesses market power in the absence of regulation, *i.e.*, it could profitably raise the prices of *all* its services above the competitive level. However, if some services, such as MTS/WATS, are constrained by regulation to competitive prices, AT&T may be unable profitably to charge supracompetitive prices for some of its other services, such as private line services, even absent regulatory constraints on their prices. Potential customers for the latter services will be able to respond to high prices by choosing either AT&T's regulated, competitively-priced services or its competitors' services. As will be explained in the next section, there are various rough indicators of market power. If certain options are desirable only after a finding that AT&T lacks market power, we seek guidance on how we should proceed to determine the existence of that condition (*e.g.*, the Commission annually collects relevant data from all common carriers and operators of private systems in the relevant market, calculates AT&T's market share, and commences a rulemaking proceeding when that share falls below sixty percent or falls by more than five percent in two years). Also, it may be desirable to alter regulation of AT&T if, after concluding that AT&T lacks market power and changing our regulation, we then observe a rise in AT&T's market power.

VI. *Assessing AT&T's Market Power*

49. Assuming that certain options are desirable only if AT&T lacks substantial market power, it will be helpful to inquire into the appropriate evaluation of AT&T's market power. This section outlines several possible approaches to this evaluation. We seek comments on the advantages and disadvantages of these approaches, both theoretical and empirical. Discussion of alternative methods for assessing AT&T's market power also would be helpful. Finally, we recognize the difficulties of estimating AT&T's post-divestiture market power. We solicit data – but not mere speculation – relevant to the analysis of AT&T's market power from 1984 to, say, 1990. Any data submitted should be accompanied by a description of the sources or methods relied on to develop the figures. Our goal here is not to obtain final empirical estimates of AT&T's future market power. Rather, this Inquiry seeks to start to provide the basis for developing a methodology for collecting, organizing, and analyzing the available information relevant to this question.

50. Market power can be defined as "the ability to raise prices by restricting output."[70] It is difficult to establish an empirical estimate of the market power of a regulated firm.[71] Regulation can be used to prevent a firm from restricting its output and thereby raising market prices. Cost-based rate regulation attempts to limit rates to the level which produces competitive profits. When its prices are so regulated, a regulated firm would not find restricting its output to be profit maximizing, regardless of the absence or weakness of rivals. On the other hand, regulation can be used by a firm to gain market power by creating barriers to entry by rivals. The following analysis deals with options under which it can be assumed that regulation does not affect AT&T's market power. Three aspects of the empirical analysis of AT&T's future market power will be discussed - market share, entry and expansion of competitors, and profits.

51. A high share of a relevant market may indicate that the ability of the firm's competitors to respond by increasing their output when the firm cuts its output may be so limited that the firm's action will cause a decline in market output and rise in market prices.[72] In order to draw an inference from market share to market power, the relevant market must encompass close demand and supply substitutes for the firm's products.[73] Close demand substitutes for one of AT&T's services include other services, supplied by AT&T or its rivals, to which a substantial number of potential customers of that service would turn. Close supply substitutes for one of AT&T's services include other services, supplied by AT&T's actual or potential rivals, produced with resources which could be used to produce that service.[74]

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[70] II P. Areeda & D. Turner, Antitrust Law 322 (1978); Broadcast Music v. Columbia Broadcasting Sytem, 441 U.S. 1, 20 (1979) (holding that a price fixing arrangement that did not restrict output was not a *per se* violation of the antitrust laws). *See Competitive Carrier Rulemaking, supra* note 6, FCC 83-481, at 5-11. *See also* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981) (market power is the ability "to raise prices above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded"); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982). Monopoly profits do not decrease market output when the monopolist engages in perfect price discrimination.

[71] *See* Landes & Posner, *supra* note 70, at 975-76; B. Owen & R. Braeutigam, The Regulation Game 1-36 (1978).

[72] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1387 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); Broadway Delivery Corp. v. United Parcel Service of America, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981). Landes & Posner, *supra* note 70, at 938.

[73] *See, e.g.*, U.S. Department of Justice, *Merger Guidelines - 1982*, 2 Trade Reg. Rprt. (CCH) para. 4500, at para. 4502; United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956); United States v. Columbia Steel Co., 334 U.S. 495, 510-11 (1948); Landes & Posner, *supra* note 70, at 944-52; F. Scherer, Industrial Market Structure and Economic Performance 60-61 (2d ed. 1980).

[74] *See* U.S. Department of Justice, *supra* note 73, at para. 4502 (close demand and

52. Relevant markets have product and geographic dimensions. We ask for information which will help us delineate the relevant market(s) for assessing AT&T's power. To assist in the formulation of comments, the next paragraph presents a summary of the analysis of the relevant product and geographic markets used in *Competitive Carrier Rulemaking* for purposes of assessing the power of many of AT&T's rivals.[75] Comments on relevant markets should address the characteristics delineating the markets, not just the trade names of services in the markets.

53. The relevant product market in *Competitive Carrier Rulemaking* is all domestic, interstate interexchange telecommunications services. There is evidence that customers shift their usage among different services and transmission media in response to changes in their relative prices. Also, suppliers readily can shift their transmission and switching resources among types of services. Close demand and supply substitutibility extends to voice, data, record, and video services, switched and private-line services, and terrestrial and satellite services. The relevant geographic market in that proceeding is nationwide (including Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and other U.S. offshore points). AT&T's facilities are almost nationwide and, through alternate routing, AT&T can shift transmission capacity from one city-pair or area to another. Other carriers also have extensive networks with alternate routing capabilities. Satellite carriers readily can shift their capacity from one area to another, and terrestrial carriers readily can expand their service areas through new facilities, interconnection, or resale. In addition, many customers consider an interexchange carrier's ability to serve multiple geographic points and its prices for services to those points when choosing a supplier.

54. The actual or readily-available capacity of AT&T's competitors in the relevant market, not just their actual sales, poses a check on AT&T's ability to restrict output and thereby raise market prices.[76] To estimate the strength of this check, AT&T's market share can be calculated as, in the numerator, AT&T's actual sales in the relevant market and, in the denominator, AT&T's actual sales in the relevant market plus the capacity of its competitors to make sales in the relevant market. A consistent unit of measurement is needed for sales and capacity, such as dollars (revenues or revenue potential), equivalent voice-grade circuit miles, or simultaneous calls. We recognize that the use of facilities for multiple services and for service to multiple geographic points makes measurement of

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supply substitutes can be identified by a response within one year to a five-percent relative increase in the price of one service). There is no widely-accepted, quantitative standard for market definition. Tariff restrictions can limit demand and supply substitutability.

[75] Fourth Report, *supra* note 6, FCC 83–481, at 10–25.

[76] Landes & Posner, *supra* note 70, at 949.

output and capacity difficult. To some extent, the data obtained through Section 214 applications and the Commission's spectrum-allocation licensing may be useful here. The capacity of potential entrants is even harder to quantify. We seek guidance on how to identify likely potential entrants and how to estimate the competitive check they pose for AT&T.[77]

55. Domestic, interstate resellers are part of the competitive check on AT&T, but the strength of this rivalry depends on AT&T's rate structure. The capacity of resellers can be expanded rapidly through the capacity of AT&T and other carriers. To reflect AT&T's ability to influence resellers' prices and to avoid double counting (*e.g.*, domsats and domsat resellers), the capacity of AT&T's competitors can be limited to their own transmission facilities for purposes of computing AT&T's market share. Facilities-based competitors of AT&T include domsats, terrestrial common carriers, and private microwave and satellite systems.[78]

56. Another factor relevant to the analysis of AT&T's market power is the entry and expansion of its competitors.[79] In an unregulated market, the success of new rivals and a firm's falling market share suggest that an existing firm lacks power or that its power is declining. New rivals can increase market output and check the ability of a firm to restrict its output and thereby raise market prices. The absence of entry does not show that an existing firm possesses market power; existing firms may be charging competitive prices because of competition among themselves or the threat of potential entry, and thereby make entry unattractive. While other common carriers have grown rapidly over the past decade, at least part of their success is attributable to regulatory rules which are changing. *See MTS/WATS Market Structure*. Since the purpose of this market-power analysis is to gain insight into the strength of market forces under different regulatory options, it is difficult to interpret the significance of past entry. Still, such entry shows that

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[77] Cases discussing the antitrust theory of potential competition include United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); BOC International v. FTC, 557 F.2d 24 (2d Cir. 1977). *See also* W. Baumol *et al.*, Contestable Markets and the Theory of Industry Structure (1982).

[78] In United States v. AT&T, *supra* note 1, 552 F. Supp. at 171, AT&T conceded that as late as 1981 its share of interexchange revenues was around 77 percent and estimates submitted by other parties were significantly higher, some contending that AT&T's market share exceeded ninety percent. *See Competitive Carrier Rulemaking, supra* note 6, FCC 83-481, at 26 n. 69.

[79] *See, e.g.*, United States v. FCC, *supra*, 652 F.2d at 106; In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965, 981–82 (N.D. Cal. 1979), *aff'd sub nom.* Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir. 1983); Greyhound Computer v. IBM, 559 F.2d 488, 496 n.18 (9th Cir. 1979), *cert. denied*, 434 U.S. 1040 (1978); Domestic Fixed-Satellite Transponder Sales, *supra* note 2, at 1254; Landes & Posner, *supra* note 70, at 950–51; P. Areeda, Antitrust Analysis 20–22, 242–43 (3rd ed. 1981).

barriers to entry and expansion have been reduced, especially for resale carriers and private microwave systems. Continuing entry and expansion under new regulatory practices may indicate that AT&T has not gained market power. There may be numerous large potential entrants in common carrier or private systems that further check AT&T's market power to some degree. The assignment of all currently-available orbital slots may limit possible future entry and growth of domsats,[80] subject to possible technological developments and spectrum reallocation.

57. Finally, persistent supracompetitive profits indicate that an unregulated firm possesses market power.[81] Evaluation of a firm's profits as supracompetitive must reflect the riskiness of the firm's activities and its ability to earn economic rents.[82] The absence of such profits does not indicate the lack of power since the firm may be engaging in strategic behavior or simply not earning the profits that its market position would seem to make possible; the firm may be able to earn supracompetitive profits in the future. Regulation of AT&T has constrained its overall rate of return though at times AT&T has earned less than its authorized rate of return. The fact that in the past AT&T did not earn persistent supracompetitive profits is not empirical evidence that it would be powerless under less stringent regulation. However, future evidence that AT&T is earning persistent high profits may indicate that the prevailing regulation and certain options involving further relaxation of our regulatory scrutiny are undesirable at that time.

VII. Ordering Paragraphs

58. IT IS SO ORDERED pursuant to Section 4(i), 4(j), 218, 303(g), and 404 of the Communications Act of 1934 THAT this Inquiry IS HEREBY INSTITUTED and that the Secretary shall cause this Notice to be published in the Federal Register.

59. It IS FURTHER ORDERED THAT parties wishing to participate in this Inquiry shall submit comments to this Commission no later than February 1, 1984. Reply comments must be submitted no later than March 19, 1984.

FEDERAL COMMUNICATIONS COMMISSION
WILIAM J. TRICARICO, *Secretary*

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[80] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, *supra* note 2.

[81] II P. Areeda & D. Turner, *supra* note 70, at 331–41.

[82] *Competitive Carrier Rulemaking, supra* note 6, FCC 83-481, at 6–10.

Cellular Communications Systems
Petition for Special Relief

Application for license to cover CP (in part) to operate on frequency block B in Domestic Cellular Radio Telecommunications Service granted. Petition for relief to defer action on application denied. Petitioner failed to establish *prima facie* case of public harm.
–Chicago SMSA LTD. Partnership

FCC 83–458

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of

CHICAGO SMSA LIMITED PARTNERSHIP

For license to cover construction permit (in part) to operate on frequency Block B in the Domestic Cellular Radio Telecommunications Service to serve the Chicago, Illinois, Standard Metropolitan Statistical Area

File No. 27159-CL-P-83

MEMORANDUM OPINION AND ORDER

(Adopted: October 6, 1983; Released: October 7, 1983)

BY THE COMMISSION:

1. Before the Commission is an application for a radio station license to cover construction permit (in part) in the Domestic Public Cellular Radio Telecommunications Service, filed on June 7, 1983, by Advanced Mobile Phone Service, Inc. (AMPS), General Partner of the Chicago SMSA Limited Partnership.[1] AMPS asserts that the terms of the construction permit have been met and the station is ready for operation relative to base station locations for cells 001, 002, 003, 004, 006, 007, 008, 009, 011, 014, 015, and 016.[2] Also before us are the following pleadings: Petition to Defer Agency Action filed

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[1] Centel Cellular Company owns a small portion of the Limited Partnership. In this order we refer to the applicant as AMPS.

[2] AMPS still has to complete construction of five locations. Because we deal with all the substantive issues in this order, AMPS' application to incorporate the five additional cells shall be a minor application not subject to public notice and an opportunity to comment.

by Cellular Mobile Systems of Illinois, Inc. (CMS); Opposition to Petition to Defer filed by AMPS; Petiton for Relief filed by CMS; and an Opposition to Petition for Relief filed by AMPS.[3] For the reasons discussed below, we will grant AMPS' application and deny the petitions filed by CMS.

Background

2. On November 1, 1982, in *Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512 (1982) (*Chicago Order*), we granted AMPS' application for a construction permit to serve the Chicago, Illinois, Standard Metropolitan Statistical Area (SMSA).[4] In the Order, at para. 16, we stated we would not resolve the Petitions to Defer filed against the AMPS application[5] until the time we considered granting the license to cover. We shall now consider the remaining petitions.

3. In its petition CMS requests that the Commission defer any final action on the wireline application until such time as the Commission takes comparable action on the nonwireline application in the same market area, or at a minimum condition the grant to prevent institution of service until the nonwireline license is granted. It asserts that a grant of the wireline application will bias the competitive circumstances in the market irretrievably and unfairly in favor of the wireline carrier. CMS further alleges that a grant of the wireline application in advance of action on the nonwireline proposals is inconsistent with the rationale for establishing two cellular systems per market (i.e., facilities based competition), and that it guarantees AMPS a dominant position for the indefinite future. This result, according to CMS, does not comport with the Commission's public interest responsibilities and is contrary to the competitive rationale in the *Cellular Rulemaking*.[6] It analogizes the circumstances in this case to those in the *Domestic*

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[3] A Petition to Defer Action was also filed by Rogers Radiocall, Inc. (Rogers). Rogers informed the Commission on September 7, 1983, that it no longer wishes to pursue its Petition. *See* note 5, *infra*. In this order, we dismiss Rogers' pleading. Therefore, we do not address the merits of this petition.

[4] Thereafter, AMPS submitted a minor amendment substituting the Limited Partnership as the applicant.

[5] Both petitions were filed on July 26, 1982, while the application for a construction permit was pending. CMS' petition also refers to the Baltimore, Maryland, Denver, Colorado, and Pittsburgh, Pennsylvania SMSAs. After the application at issue here for a license to cover was placed on public notice, only CMS filed on July 11, 1983, a Petition for Relief. Both Rogers and CMS are applicants for the nonwireline block of frequencies in the Chicago, SMSA. Their applications were designated for hearing in the Chicago Order *supra*, and an initial decision by the Administrative Law Judge was released on August 17, 1983, FCC 83D-49. In this decision Rogers application was granted.

[6] Report and Order, 86 FCC 2d 469 (1981), *modified* 89 FCC 2d 58 (1982), *further modified* 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* U.S. v. FCC, Civ. No. 82–1526 (D.C. Cir., March 3, 1983).

Communications Satellite Facilities proceeding, 35 FCC 2d 844, 38 FCC 2d 665 (1972)[7] and asserts that the relief it requests is consistent with the approach in that case. Finally, CMS alleges that the Commission's policies *de facto* deprive nonwirelines of their hearing rights because their exercise of procedural due process rights precludes their market survival by delaying their entry. In its petition CMS avers that our earlier decision not to rule on the merits of its petition to defer was plainly in error. It goes on to state that, having permitted AMPS to proceed with construction, the Commission has compromised its ability to consider the merits of the CMS petition because AMPS has made a substantial capital commitment.

4. AMPS in its oppositions argues that the petition fails to meet the burden specified by the Commission in the *Cellular Rulemaking* [8] and that it constitutes an untimely petition for reconsideration of that proceeding. AMPS further asserts that CMS failed to make the showing required before "headstart protection" can be obtained and that the public interest cannot be served by further delaying the commencement of cellular service. AMPS further contends that CMS has not considered the impact of the ability of nonwirelines to resell in its arguments for a headstart delay.[9] AMPS also avers that there is an immediate and overwhelming public need for cellular service in Chicago and that to grant headstart protection would subvert the Commission's fundamental policy of encouraging settlements elsewhere in the nation. AMPS alleges that if headstart protection is granted the incentive for nonwireline carriers to reach settlements would be diminished. AMPS argues that petitioner only made unsupported, generalized pleas without regard to the Commission's criteria, the nature of the Chicago market, or the public interest. AMPS further points out that the petition proceeds from the false premise that AT&T will operate the Chicago system and somehow dominate the cellular market. It avers that under the *Modification of Final Judgment* in *United States v. American Telephone and Telegraph Co.* Civ. Nos. 74–1698 and 82–0192, 552 F. Supp. 113, (D.D.C. 1982), AT&T's cellular operating subsidiaries and resources (including all of its construction permits and covering licenses) will be divested. AMPS further asserts that it is the seven regional companies that will operate cellular systems, thus, CMS' allegations about AT&T's market power and its reliance on *Domestic Communications Satellite Facilities*, *supra*, are irrelevant.

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[7] In this proceeding the Commission delayed the American Telephone and Telegraph Company's (AT&T) full entry into the domestic satellite field.

[8] 86 FCC 2d at 497, n. 57, 89 FCC 2d at 74–75.

[9] AMPS' tariff filing with the Illinois Public Service Commission permits resale of its facilities. Anyone, including CMS, may contract with AMPS as a reseller.

Discussion

5. In the *Cellular Report and Order*, 86 FCC 2d 469, 491 n. 57, (1981), we stated the following:

> Because a wireline carrier is unlikely to be encumbered by a competing applicant for the same facility, a problem may arise as a result of the wireline company's ability to get an early start in constructing and operating in its market. In our view, because of the great unsatisfied existing and potential demand for cellular service, it is unlikely that many markets will be unable to support two cellular systems. We also consider it unlikely that the advantage from an early entry into the market would be sufficiently significant to outweigh the need to grant immediate relief in markets, particularly in light of the requirement that no restrictions be placed on resale and shared use of cellular services. *See* paragraphs 103–107. If, however, a non-wireline applicant can demonstrate that permitting an early entry into the market would not be in the public interest, we would consider a request for a brief moratorium on wireline cellular service. *We should emphasize, however, that general unsupported allegations of harm will not be sufficient to delay service to the public. See WLVA Inc. v. FCC,* 459 F.2d 1286 (D.C. Cir. 1972); *Carroll Broadcasting Co. v. FCC,* 258 F.2d 440 (D.C. Cir. 1958) (emphasis added).[10]

6. Subsequently on reconsideration, 89 FCC 2d 58, 74 and n. 32 (1982), we reiterated our previous conclusion and we further clarified what we meant by a "brief moratorium on wireline service:"

> First, any party requesting such a moratorium bears a heavy burden of demonstrating that such action would be in the public interest. In addition, should the public interest case be made to hold back initiation of any wireline cellular service, the moratorium imposed would be of limited duration, in no instance to exceed six months, in order to insure that the initiation of cellular service would not be unduly delayed.

7. To the extent that CMS again raises the general headstart issue, we reject its argument summarily. We were mindful that one of two competitors was likely to achieve a headstart, but we believed that, on balance, the public interest required us to accept the risks associated with that headstart. *See Order on Reconsideration, supra* at paras. 34–36, where we rejected requests for a generic prohibition against headstarts. We are, however, treating the petition as a request for a brief moratorium on the initiation of cellular service in the Chicago market.[11]

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[10] We also stated: ". . . [w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved, we have, and will exercise, our authority to defer action on the particular wireline application. 86 FCC 2d at 492.

[11] We reject CMS' contention that our decision to consider the deferral petitions at this time, rather than when we granted construction authority, was clearly in error and that because of AMPS' expenditures we have compromised our position. As we stated in our review of the Common Carrier Bureau's grant of a construction authorization in Phoenix, Advanced Mobile Phone Service, Inc., FCC 83–282, released June 21, 1983: "If petitioner demonstrates, at the time AMPS files its license application, that delay of AMPS operating authority is in the public interest, AMPS' expenditures will not affect our public interest determina-

8. An applicant seeking a brief moratorium must demonstrate that permitting one licensee's entry into the market before the other's would not be in the public interest. General unsupported allegations of harm will not be sufficient to delay service to the public. *See Report and Order*, *supra*, and Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d). Since our review of CMS' pleading shows that its request is based on general conclusory allegations we must conclude that CMS has failed to make a threshold showing of public harm. CMS' main allegation is that a headstart will guarantee AMPS a dominant anticompetitive position in the market and that simultaneous entry by both carriers is the only possible alternative.

9. The evidence before us at the time we adopted our *Report and Order* clearly identified Chicago as one of the markets where there is a high level of unsatisfied public need for additional two-way service. CMS has not tried to refute this nor did it attempt to demonstrate harm to competition from an early wireline entry would be significant enough to outweigh the need for service in the market. In addition, CMS has not presented any evidence to contradict our previous conclusion that the market will support two cellular systems.

10. Aside from its failure to allege specific facts, CMS has not presented any statistical or other evidence of any possible anticompetitive effects or that AMPS entry now will be detrimental to the public.[12] Moreover, CMS has not contradicted our conclusion that we have established adequate safeguards to promote long-run competition by two entities regardless of the sequence in which they enter the market. For instance, we have prohibited restrictions on the resale of cellular service. Our resale policy permits nonwireline entities to enter the market in a limited role and to establish a presence in the market as soon as the wireline carrier begins operation. We have also required that wireline carriers provide to nonwirelines reasonable interconnection arrangements, at least of the same type that they offer their own cellular affiliates.

11. We reiterate that petitioner has failed to establish a *prima facie* case of public harm. Under the circumstances, our decision must turn on the clear benefits to the public, manufacturers, resellers, equipment providers and others we envision from the rapid introduction of this new service.[13] We therefore conclude that the

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tion."

[12] It bears repeating that our overriding responsibility is not to foster the maximum level of competition in the industry but to promote the public interest. *See* U.S. v. FCC (*SBS*), 652 F.2d 72, 104 (1980).

[13] *See* Rogers Radio Communication Services, Inc. v. FCC, 593 F.2d 1225 (D.C. Cir. 1978). Hawaiian Telephone Co. v. FCC, 498 F.2d 771. (DC Cir 1974), FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); (competition is a factor to be weighed in determining where the public interest lies).

public should be afforded the option to utilize cellular service without additional delays.[14]

12. Accordingly, IT IS ORDERED that the application of the Chicago SMSA Limited Partnership, File No. 27159-CL-P-83, IS GRANTED.[15]

13. IT IS FURTHER ORDERED that the Petition filed by Cellular Mobile Systems of Illinois, Inc. IS DENIED, and the Petition filed by Rogers Radiocall, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[14] The general public benefits when any resource, such as the radio spectrum, is used more efficiently. For instance the use of these new mobile communications is likely to result in increased productivity, energy savings and improved economic efficiency. In the same vein, the postponement of productive use of spectrum entails the sacrifice of some realizable value to society. The longer the use of cellular spectrum is delayed, the greater the loss to the public in terms of productivity, energy savings and economic efficiency.

[15] Ameritech, the holding company parent of AMPS, remains under an obligation to assure reasonable interconnection to AMPS' competitor through its operating subsidiaries.

Application for Review
Decision, Overruled by Commission
FM Station, Authorization
Review By Commission

Application for review of Review Board Decision, 88 FCC 2d 750 (1981), granted. Review Board's decision modified, and application for CP for FM station granted to CJL B/cing, Inc.
-CJL B/cing, Inc.
BC Docket No. 80–323

FCC 83–490

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of
CJL BROADCASTING, INC.
Menominee, Michigan
BC Docket No. 80–323
File No. BPH-790213AG

MEN-MAR BROADCASTING CORPORATION
Menominee, Michigan
BC Docket No. 80–324
File No. BPH-790417AA

For Construction Permit For A New FM Station

Appearances

Mark E. Fields, on behalf of CJL Broadcasting, Inc.; and *J. Richard Carr*, on behalf of Men-Mar Broadcasting Corporation; *Daniel Simms* and *Allan Moskowitz*, on behalf of the Chief, Mass Media Bureau.

DECISION

(Adopted: October 19, 1983; Released: October 21, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

1. Presently before the Commission is an Application for Review of a December 17, 1981 Review Board Decision[1] affirming the

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[1] *CJL Broadcasting, Inc. (Review Board Decision)*, 88 FCC 2d 750 (1981).

Administrative Law Judge's Initial Decision[2] granting a construction permit for a new FM broadcast station to Men-Mar Broadcasting Corporation (Men-Mar) and denying the mutually exclusive competing application of CJL Broadcasting, Inc. (CJL), filed by CJL on January 18, 1982. Men-Mar filed an Opposition on February 3, 1982, to which CJL filed a Reply on February 16, 1982.[3]

2. In the case at bar CJL was awarded a slight diversification preference by the Review Board. To overcome this advantage, Men-Mar had to show that it would provide the best practicable service, and that this advantage outweighed the slight diversification preference held by CJL. The Review Board so concluded. It awarded Men-Mar a moderate preference for its overall integration proposal, a slight preference to CJL for its comparative coverage and assessed a substantial demerit to CJL for its program duplication. On balance, the Review Board concluded that Men-Mar's application promised the best practicable service and that this offset CJL's slight diversification advantage.[4]

3. In a concurring statement by Board Member Blumenthal, in which Board Chairman Marino joined, it was suggested that other than the difference in the applicants' program duplication proposals, "[t]here is virtually nothing else to distinguish the two applicants: both are AM licensees in the market, both are eminently qualified, and there is no question that if the duplication proposals had been identical (or even closer), CJL would have been a hands-down winner, and rightly so. The competitive scales between CJL and Men-Mar would have been nudged closer to equipoise."[5]

4. In its Application for Review, CJL raises a number of arguments. On analysis, we view the pivotal questions as being whether the Review Board correctly concluded that CJL warranted a substantial comparative demerit for its proposed AM/FM program duplication and correctly evaluated the comparative difference

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[2] *CJL Broadcasting, Inc. (Initial Decision),* 88 FCC 2d 764 (1981).

[3] Since no reply pleading was requested by the Commission, CJL's reply is in contravention of Section 1.115(f) of the Commission's Rules and will be dismissed. *See Adjudicatory Re-regulation Proposals,* 58 FCC 2d 865, 876 (1976). CJL's Petition to Remand and Enlarge Issues filed June 22, 1983, will also be dismissed in light of the Commission's action taken herein.

[4] In our 1965 *Policy Statement on Comparative Broadcasting Hearings,* 1 FCC 2d 393 (1965), we established broad guidelines to facilitate the selection of that particular applicant which will best serve the public interest, convenience and necessity. The two major objectives of the selection process are to secure the best practicable service to the public and to maximize diffusion of control of mass communications media. Diversification is a factor of primary importance while best practicable service is a composite factor made up of many sub elements. Under the best practicable service standard, questions such as comparative coverage, integration of ownership and management and the amount of program duplication are, *inter alia,* considered.

[5] *Review Board Decision,* 88 FCC 2d at 761 (Concurring Statement of Board Member Blumenthal in which Board Chairman Marino joined).

between the two applicants with regard to the diversification factor. Upon review of the record, we conclude that these questions were wrongly decided, that CJL should have been assessed only a slight comparative demerit for its program duplication and that it was entitled to a moderate preference under the diversification factor. Because of the Commission's disagreement with the Board's findings and conclusions regarding the resolution of these matters, it is therefore necessary that we grant CJL's Application for Review and decide this case on the basis of what we believe to be the proper governing standards. The Commission otherwise agrees with the Board's remaining findings of fact and conclusions of law concerning integration of ownership and management, and comparative coverage. Accordingly, those findings and conclusions are hereby adopted.

5. As a matter of policy the Commission disfavors the use of two frequencies to bring a single broadcast program to the same receiver location. *Jones T. Sudbury*, 8 FCC 2d 360, 10 RR 2d 114, 117 (1967). The essence of this policy is captured in Section 73.242 of the Commission's Rules which limits duplication by FM stations licensed to communities of over 25,000 population to no more than 25 percent of their average program week. The practice of computing the amount of allowable duplication as a percentage of the FM station's average program week is embedded in the case law[6] and the Commission's interpretation of the rule.[7] Under the particular facts of this case, we recognize that since Menominee has a population under 25,000 people the cited rule (Section 73.242) does not control the present situation.[8] By the same token it has long been held that although the rule may be inapplicable, the policy underlying the rule is particularly relevant in comparative proceedings.[9] Thus, the standards that govern implementation of Rule 73.242 are also controlling in ascertaining the percentage of duplicated programming that will be heard during the average broadcast week of a new FM station.

6. Whether an applicant proposing duplicated programming should be assessed a demerit, and if so, whether it should be substantial, moderate or sight, depends on two factors: first, the

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[6] *Nuance Corporation*, 85 FCC 2d 412, 414 (Rev. Bd. 1981); *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 118 (Rev. Bd. 1980); *Athens Broadcasting Co., Inc.*, 17 FCC 2d 452 (Rev. Bd. 1969); *WLCY, Inc.*, 17 FCC 2d 338 (Rev. Bd. 1969); *Century Broadcasting Co., Inc.*, 3 FCC 2d 368 (1966).

[7] *See Request for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission's Rules (AM-FM Program Duplication)*, 2 FCC 2d 833, 835 (1966), wherein we provided a specific interpretation of the rule. *See also Report and Order on Assignment Standards*, 45 FCC 1515, 1530–1534 (1964), *reconsideration denied*, 45 FCC 2092, 2096–2100, 2102 (1965), *Notice of Proposed Rule Making in AM Station Assignment Standards*, FCC 63–468, 25 RR 1615, 1623 (1963).

[8] *Initial Decision, supra*, at 766.

[9] *WLCY, Inc., supra*, at 344 n.11. *See also Nelson Broadcasting Co.*, 3 FCC 2d 84, 92 (Rev. Bd. 1966).

extent to which there are countervailing benefits deriving from the duplication,[10] and second, the proponent's establishing that, even if it proposes some duplication, the amount of such duplication is comparatively insignificant vis-a-vis that of an opponent who is also proposing to provide a degree of duplicated programming.[11]

7. Having set forth the governing principles we now turn to the particulars of this case to determine the respective amounts of program duplication proposed by each applicant. CJL proposes to operate its FM station 18 hours a day (6:00 a.m. to 12:00 midnight) for a total of 126 hours a week.[12] Of this amount CJL proposes to duplicate the entire broadcast schedule of its commonly owned daytime only station WCJL(AM), Marinette, Wisconsin,[13] which amounts to between 71.5 and 110.25 hours of operation per week, depending upon the variance in sunrise to sunset hours during the course of the year.[14] On a year-round basis, 67% of CJL's total average FM broadcast week would be comprised of duplicated programming.[15] There was a minor countervailing benefit stemming from CJL's proposal to serve 18,640 persons not presently served by WCJL(AM) during the limited hours from 6:00 a.m. to local sunrise.

8. Men-Mar proposes to operate its new FM station 109 hours a week.[16] Of this amount Men-Mar proposes to duplicate 41.33 hours of its commonly owned Station WAGN(AM), Menominee. Therefore, on a year-round basis, 37.9%[17] of Men-Mar's total average broadcast week would be comprised of duplicated programming. With respect to Men-Mar's duplication proposal, a countervailing benefit derived from the fact that its proposed FM station with its "beautiful music"

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[10] *Jones T. Sudbury, supra.*

[11] Given the inherent inefficiency associated with program duplication, the second factor becomes relatively unimportant in those situations where only one of the competing applicants proposes duplication. For one who proposes no duplication is in a substantially better comparative position than an opponent who proposes some duplication.

[12] *Initial Decision, supra,* at 772.

[13] Marinette, Wisconsin and Menominee, Michigan are adjoining communities separated only by the Menominee River. Because of this proximity and the fact that the four existing stations assigned to the two communities will compete for the same advertisers and listeners, the ALJ and Review Board rightfully concluded that the communities of Menominee and Marinette constitute a single radio market.

[14] *Initial Decision, supra,* at 772–773.

[15] The figure of 67% is based on the fact that the proposed CJL FM station would simulcast the programming of AM station WCJL an average of 12 hours a day and that the FM station would be on the air for 18 hours a day.

[16] Neither the Review Board nor the AlJ made any specific findings going to the total hours of operation proposed by Men-Mar. Consequently, resort was had to Men-Mar's Application, FCC Form 301, Part III, Question 14, which proposed 109 total hours of operation during a typical week.

[17] The 37.9% figure is the quotient of the number of duplicated programming hours (41.33) divided by the number of total broadcast hours (109) proposed by Men-Mar.

format would appeal to a totally different audience than to one listening to its AM station, with its rock music format.

9. Thus, both applicants propose some duplication, but both have established some countervailing benefits. Numerically, CJL proposes 28.8% more program duplication a week than does its counterpart, Men-Mar (66.7%–37.9%). In comparison with other cases where both applicants proposed some duplication, this degree of differential would not support the imposition of a substantial demerit. In *WLCY, Inc.*[18] a differential of 15.46% resulted in a very slight preference. In *Athens Broadcasting Co.*,[19] a 36% difference resulted in a slight preference to Athens.[20] We conclude that the differential existing in the instant proceeding falls within the ambit of these two cases and that only a slight demerit should have been assessed against CJL for its greater amount of program duplication.

10. Turning to the question of diversification, we note two shortcomings in the Review Board's disposition of this comparative factor. First, the Board failed to give sufficient weight to the fact that grant to Men-Mar would provide no new media voice, whereas grant to CJL will provide a new voice during nighttime operating hours.[21] Although this factor is mitigated where there are competing applications with no other media interests and by the existence of other stations licensed to serve the community,[22] it nonetheless provides in the instant proceeding an additional means to promote our diversification policies.[23] Accordingly, grant to CJL will best

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[18] *WLCY, Inc., supra.* (WLCY - 35.14%; Rust Craft 19.68%, the percentages reflecting the total amount of the average broadcast week comprised of duplicated programming).

[19] *Athens Broadcasting Co., supra.* (3 J's - 84%; Athens - 48%, the percentages again reflecting the proportionate amount of the FM station's duplicated programming during an average program week).

[20] The obverse to a comparative preference is a comparative demerit. When both applicants propose duplication neither party can be expected to gain a preference by default. As in any factor of comparison, it is the degree of difference which commands the weight to be accorded the difference. Thus, it was error for the Review Board to ignore the extent of this difference simply because one applicant proposed more duplication than the other.

[21] *Cf. KALT-FM, Inc.*, 49 FCC 2d 61, 64 (Rev. Bd. 1974); *KALT-FM, Inc.*, 49 FCC 2d 65 (I.D. 1974); *Voice of Dixie, Inc.*, 41 FCC 2d 550 (Rev. Bd. 1973), *rev'd on other grounds*, 45 FCC 2d 1027 (1974), *recon. denied*, FCC 74–604, 30 RR 2d 851 (1974); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 229, 15 RR 2d 1349, 1353 (Rev. Bd. 1969); *Triple C Broadcasting Corp.*, 16 FCC 2d 357 (1969); and *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415, 15 RR 2d 743 (1969).

[22] *See Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1082 (Rev. Bd. 1980).

[23] *See Community Broadcasting Service, Inc.*, FCC 65R-447, 6 RR 2d 589 (Rev. Bd. 1965); *Requests for Exemption from or Waiver of the Provisions of Section 73.242, supra*, at 840 and 841, and *AM-FM Program Duplication, Report and Order*, 59 FCC 2d 147, 148 n.5 (1967), where the Commission noted that the diversity in programming made possible through the non-duplication rules somewhat obviated the need to require separation of ownership of co-located AM and FM stations.

promote the Commission's policy favoring the maximum possible diffusion of communications media.

11. Secondly, the Board failed to consider the impact of Men-Mar's indirect media interests in two radio stations located in California.[24] Instead, the Board limited its assessment to the question of Men-Mar's existing fulltime AM operations versus CJL's daytime only standard broadcast service. The Board concluded that this distinction, coupled with the proximity of CJL's existing station to the community of license and the greater coverage of CJL's existing station vis-a-vis that of Men-Mar's existing station, warranted only a slight preference on CJL's behalf. In contrast, the Administrative Law Judge had also taken into consideration the impact of Men-Mar's indirect broadcast interests in his evaluation of this factor. While the ALJ concluded that CJL's diversification preference would otherwise be slight, the additional media interests held by Men-Mar warranted upgrading the preference from slight to moderate.[25] The ALJ thus concluded that, overall, CJL would best serve the Commission's objective of promoting additional broadcast voices. On analysis, we conclude that the ALJ was correct in upgrading CJL's diversification preference from slight to moderate for two reasons. First, CJL would be bringing a new radio voice to the area at night and second, CJL held no other media interests outside the community to be served, whereas Men-Mar held indirect ownership interests in two other broadcast stations in addition to the only full time station licensed to Menominee.[26] Thus, on consideration of all factors, CJL is entitled to a moderate preference under the diversification factor.

12. In sum, CJL's moderate diversification preference, which is a factor of primary importance, coupled with its slight preference for its comparative coverage are sufficient to overcome its slight demerit for comparatively more program duplication and Men-Mar's moderate preference for its overall integration proposal.[27] Under these

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[24] A 48.45% stockholder of Men-Mar also owns 40% of Oroville Radio, Inc., licensee of KORV and KEWE(FM), Oroville, California.

[25] *Initial Decision, supra,* at 777 and 780.

[26] Although not as significant as media holdings in the proposed community of license, or interests in the remainder of the proposed service area, media holdings generally in the United States must still be considered under the diversification factor. *Policy Statement on Comparative Broadcast Hearings, supra,* at 394–5.

[27] In the context of this adjudicatory proceeding, we do not reach the policy question raised by Review Board Member Blumenthal and Board Chairman Marino in their concurring statement. The Board Members suggest that a decision to broadcast duplicated programming is a private business decision lying beyond the scope of the Commission's concern and therefore should not be used as a basis for comparing applicants. For the present time, we find that the non-duplication policy serves as an important spectrum management tool and therefore continues to be a factor warranting consideration in the Commission's licensing determinations. *See Amendment of Part 73 of the Commission's Rules,* 45 FCC 2092, 2098 (1965); *AM-FM Program Duplication,* 59 FCC 2d 147, 152 (1976).

circumstances, the public interest will be best served by grant of CJL's application and denial of Men-Mar's application.

13. ACCORDINGLY IT IS ORDERED, That the Application for Review filed January 8, 1982 by CJL Broadcasting, Inc. IS GRANTED.

14. IT IS FURTHER ORDERED, That the Review Board Decision, *CJL Broadcasting, Inc.*, 88 FCC 2d 750, IS MODIFIED to the extent indicated herein; that the application for a construction permit for a new FM broadcast facility to operate on 106.3 MHz, FM Channel 292, at Menominee, Michigan filed by CJL Broadcasting, Inc. (File No. BPH-790213AG) IS GRANTED and that the Application of Men-Mar Broadcasting Corporation (File No. BPH-790417AA) IS DENIED.

15. IT IS FURTHER ORDERED, That the unauthorized Reply to Men-Mar's Opposition filed February 16, 1982 by CJL Broadcasting, Inc. IS DISMISSED.

16. IT IS FURTHER ORDERED, That the Petition to Remand and Enlarge Issues filed by CJL Broadcasting, Inc. on June 22, 1983, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Character Qualifications, Lack of Candor
Financial Qualifications, Availability of Funds
Reconsideration, Petition for, Denial of

> **Review Board denied reconsideration of decision, in which it concluded that an applicant was financially unqualified. Board affirmed denial of the subject application. Since the only competing application was dismissed, the television channel at issue will be reopened for the filing of new construction permit applications.**
> **–*Coastal Bend Family TV, Inc.***
> **BC Docket No. 80–460**

FCC 83R–79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COASTAL BEND FAMILY TELEVISION, INC. Corpus Christi, Texas	BC Docket No. 80–460 File No. BPCT-790507KE
CHRISTIAN CHILDRENS NETWORK, INC. Corpus Christi, Texas	BC Docket No. 80–461 File No. BPCT-791026KI
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: October 6, 1983; Released: October 12, 1983.)

BY THE REVIEW BOARD:

1. The Review Board again has under consideration a petition for reconsideration filed by Christian Childrens Network, Inc. (Christian), which was disqualified in our prior Decision, 54 RR 2d 367, released June 24, 1983, in this proceeding. By Order, FCC 83R-59, released August 26, 1983, the Board directed Coastal Bend Family Television, Inc. (Coastal) to file supplementary information in response to Christian's reconsideration argument that the record should be reopened and the proceeding be remanded for further hearing on Coastal's financial and character qualifications. The requested information was filed; however, on October 3, 1983, Coastal asked that its application be dismissed, stating that no direct

or indirect consideration has been paid or promised to induce the dismissal. We will grant Coastal's request, thereby also mooting Christian's remand plea.

2. What remains for discussion are Christian's reconsideration contentions that the Board erred in concluding that a financial misrepresentation issue should have been added against Christian, that Christian deserved a substantial demerit for its lack of candor concerning its finances, and that Christian was financially unqualified to be a Commission licensee. We need not address Christian's first point, since the denial of its application was not grounded on our judgment that a financial misrepresentation issue against Christian would have been appropriate. That was only a preliminary assessment of the *prima facie* evidence at hand, not a final conclusion on the substantive question of misrepresentation. Hence, it is not appealable.[1] Nor will we focus on Christian's protestations concerning its substantial demerit for lack of candor. That demerit was richly deserved. Christian simply rehashes arguments that were fully treated in our Decision, *supra*, at 373–374, and it is well-established that reconsideration is not available for such encores. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

3. Turning to its financial disqualification argument, Christian simultaneously filed a petition for leave to amend on July 22, 1983, in which it proffers an amended December 31, 1982 balance sheet and related documentation pertaining to William Reiff's proposed loan commitment of $270,000 to Christian. The amendment updates Christian's April 7, 1983 financial plan, which envisions that its projected construction and operation costs of $206,827 will be met by Reiff's loan. The April 7 plan was rejected in our Decision, *supra*, at 372–373, as procedurally lacking good cause and substantively deficient. The same must be said of Christian's latest effort, since it contains no good cause showing whatsoever and is still substantively inadequate.[2] The Commission may properly snub such a belated attempt to repair a defective showing, "not involving newly discovered evidence nor otherwise attended by good cause." *Crosthwait* v. *FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978). Indeed, while the Board has approved zealous efforts to meet disqualifying issues even by repeated amendment, *Bison City TV 49 Limited Partnership*, 91 FCC

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[1] However, we reiterate that but for Christian's financial disqualification, which we affirm *infra*, we would remand this proceeding to explore the effect of Christian's alleged financial misrepresentation (see 54 RR 2d at 368–370) on its basic character qualifications to be a licensee.

[2] In its reconsideration petition, Christian also briefly disputes the Board's affirmance of the ALJ's rejection of an earlier financial amendment, relying on a July 21, 1983 affidavit by Leonard K. Buntrock, its chief operating officer. However, the affidavit fails to address the relevant time periods on which the ALJ's and Board's determinations were based and is essentially another rehash. See paragraph 2, *supra*.

2d 26, 52 RR 2d 63 (Rev. Bd. 1982), there comes a time when to permit further amendment, absent extraordinary circumstances (*see Crosthwait, supra*), would make a mockery of the concept of administrative finality. That point has been reached here, and there are no extraordinary circumstances present. Even if there were, Christian's latest amendment substantively fails to cure any of the defects previously noted in its attempt to show reasonable assurance that Reiff will be able to fulfill his loan commitment to Christian: while Reiff's net worth has increased from $641,726 to $758,252 and the ratio between that net worth and his loan commitment has risen from 2.4:1 to 2.8:1, this ratio is still dramatically less than what case precedent contemplates for the presumption of ready liquidity; Christian's additional supplementary material fails to demonstrate the actual ready marketability or liquidity of Reiff's real estate holdings; and Reiff has not indicated which properties he would attempt to sell to meet his loan commitment to Christian.

4. Thus, we affirm our previous conclusions that Christian has failed to meet its burden of demonstrating that it is financially qualified, and that Christian deserves a substantial character demerit because of its serious lack of candor in this proceeding (under the already-tried financial candor issue). Accordingly, we deny Christian's petition for reconsideration and affirm the denial of its application. With the dismissal of Coastal's application, the upshot of this proceeding is that Channel 38 at Corpus Christi will remain vacant until new construction permit applications are received and processed; however, it is truly better to have an empty house than a bad tenant.

5. ACCORDINGLY, IT IS ORDERED, THAT Christian Childrens Network, Inc.'s petition for leave to amend, filed July 22, 1983, IS DENIED, and that Coastal Bend Family Television, Inc.'s petition for leave to amend, filed September 14, 1983, IS GRANTED.

6. IT IS FURTHER ORDERED, That Christian Childrens Network, Inc.'s petition for reconsideration, filed July 22, 1983, IS DENIED.

7. IT IS FURTHER ORDERED, That Coastal Bend Family Television, Inc.'s motion to strike, filed August 23, 1983, IS GRANTED;

8. IT IS FURTHER ORDERED, That Coastal Bend Family Television, Inc.'s request for dismissal of its application, filed October 3, 1983, IS GRANTED, and its application (File No. BPCT-790507KE) IS HEREBY DISMISSED; and

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

Federal Communications Commission
Jerold L. Jacobs, *Member, Review Board*

Common Carrier, Authorization
Common Carrier, Rates, Charges
Competition, Common Carrier

Fourth Report and Order adopted regarding policy and rules concerning rates for competitive common carrier service and facilities authorizations.
–Common Carrier Services
CC Docket No. 79–252

FCC 83–481

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor	CC Docket No. 79–252

FOURTH REPORT AND ORDER

(Adopted: October 19, 1983 Released: November 2, 1983)

BY THE COMMISSION:

I. *Introduction*

1. This proceeding was instituted to allow us to adjust our common carrier tariff and facilities authorization requirements in light of the entry of new suppliers of interexchange telecommunications services. *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979) (*Notice*). In the *First Report and Order*, 85 FCC 2d 1 (1980) (*First Report*), we established two classes of common carriers, dominant and non-dominant. The non-dominant carriers are those lacking market power and, therefore, lacking the ability to set prices contrary to the goals of the Communications Act of 1934. We found that regulatory requirements for non-dominant carriers could be reduced or "streamlined," removing costly regulatory burdens without abandoning our mandate under the Act.[1] We have taken a

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[1] Under the rules for non-dominant carriers, their tariff filings are presumed lawful and a petitioner seeking suspension must demonstrate generally that the injury to competition from allowing the tariff proposal to become effective is greater than the harm to the public from depriving it of the service proposed. In addition, these carriers are permitted to file tariffs on 14 days notice (rather than up to ninety), and are not required by our rules to submit extensive economic support data. They also have been granted authority under Section 214 of the Act to install or lease additional circuits over previously-authorized transmission facilities (radio and

step-by-step approach to the classification of carriers as non-dominant. In the *First Report*, specialized common carriers and terrestrial resellers[2] were classified as non-dominant and received streamlined regulatory scrutiny for all services they provide in the continental United States.

2. In the *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) (*Further Notice*), we proposed a more careful delineation of relevant markets for analysis of carriers' market power. We reviewed the language and legislative history of the Act and tentatively concluded that the Title II regulatory scheme was intended to prevent the exercise of substantial market power, not necessarily applying fully to all companies offering telecommunications services. When applied to carriers without market power, this regulatory scheme thwarts the goals of the Act by fostering inefficiencies and imposing costs on carriers and consumers without offsetting benefits to consumers. Consequently, we proposed to remove these regulatory requirements for non-dominant carriers.

3. In our *Second Report and Order*, 91 FCC 2d 59 (1982) (*Second Report*), *recon.* FCC 83–69 (released March 21, 1983), we concluded that we have the authority to forbear applying particular Title II tariff-filing and facilities-authorization regulations when such for-

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non-radio) anywhere in the contiguous 48 states, limited only by the requirement that they inform the Commission every six months of these additions. Finally, when notice has been served on customers, an application by a non-dominant carrier to discontinue service will be granted automatically on the 31st day after its filing unless the Commission notifies the applicant to the contrary.

It is costly for carriers to prepare tariff and facilities-authorization filings under our rules for dominant carriers, 47 C.F.R. §§ 61, 63 (1982). Also, requiring authorizations pursuant to our rules for dominant carriers can delay implementation of services and facilities that would benefit consumers. Finally, these filings can impede entry, impair competitive pricing, and facilitate collusive conduct. *See* United States v. United States Gypsum Co., 438 U.S. 422, 457 (1978) ("the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions"); Ethyl Corp., 3 Trade Reg. Rpts. para. 22,003 (F.T.C. 1983) (advance notice of price increases impeded discounts and facilitated collusion).

[2] In the *First Report*, 85 FCC 2d at 28 & n.69, we characterized specialized common carriers as providers of terrestrial voice and data services, and included the following carriers in this category for purposes of this rulemaking: MCI Telecommunications Corporation, Southern Pacific Communications Company, United States Transmissions Systems, Inc. (USTS), Goeken Communications, Inc., and Western Tele-Communications, Inc. The treatment of specialized common carriers in this rulemaking is not limited to these named carriers. We defined resellers as carriers that lease all of the circuits that they use to provide service to their customers from underlying carriers. *Id.* at 29. Furthermore, we defined miscellaneous common carriers as carriers that relay video signals and their corresponding audio components by terrestrial microwave links. *Id* at 27. To the extent that direct broadcast service providers may be considered to operate as common carriers, they will be treated under the regulatory scheme established in this Order for domestic satellite carriers and domestic satellite resellers.

bearance furthers statutory purposes; in particular, we decided to forbear applying such regulation to terrestrial resellers.[3] Carriers treated by forbearance remain subject to other Title II regulation, including the obligation to charge just, reasonable, and non-discriminatory rates under Sections 201–202 and the Section 208 complaint process. The geographic scope of the reduced regulation ordered in the *First Report* and *Second Report* was expanded to include Alaska on reconsideration of the *Second Report*, FCC 83–69 (released March 21, 1983), and to include Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points by order of the Common Carrier Bureau, acting on delegated authority.[4]

4. We have before us petitions for reconsideration of our determinations in the *First Report* as well as comments and reply comments to the *Further Notice* and *Second Further Notice*. In this Order, we take a further step in classifying certain additional carriers as non-dominant, but we do not address all the petitions before us;[5] some are left for future resolution and we express no opinion on their merits here.

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[3] Forbearance involves less disclosure to competitors of carriers' rates and tariff conditions than streamlined regulation. Consequently, forbearance eliminates a potential vehicle for collusive conduct and facilitates price discounting. *See* note 1 *supra*.

[4] Third Report and Order, Mimeo 012 (released October 6, 1983) (*Third Report*). So that our Rules will conform with the policy adopted in the Bureau's *Third Report*, we are amending Section 63.07 of the Rules (47 C.F.R. § 63.07) as set forth in the attached Appendix. The notice and comment requirements of 5 U.S.C. § 553(b) have already been satisfied for this change by the Bureau's Third Further Notice of Proposed Rulemaking, Mimeo CC 33457 (released June 14, 1983), 48 Fed. Reg. 28282 (June 21, 1983). This change became effective immediately upon publication of the *Third Report* in the Federal Register. *Third Report* at 5 n. 9.

[5] We address here the petitions of General Telephone and Electronics Corp. (GTE) and the United States Independent Telephone Association (USITA) for non-dominant treatment of independent telephone companies; petitions of Andrews Tower Rental, East Texas Transmission Company, Hi-Desert Microwave, Pilot Butte Transmission Company, Gordon & Healy, United Video Inc. (United Video), and Western Tele-Communications, Inc., for non-dominant treatment of miscellaneous common carriers; the petitions of ISA Communications Services (ISA-COMM), Southern Satellite Systems, Transponder Corp. of Denver, and United Video for non-dominant treatment of domsat resellers; petitions of the National Telecommunications and Information Administration (NTIA) and Western Union Telegraph Company (WU) for non-dominant treatment of WU; petitions of Satellite Business Systems (SBS), American Satellite Company, and RCA American Communications, Inc. for non-dominant treatment of domsats; and petitions of RCA Global Communications, Inc., U.S. Department of Justice, and ITT World Communications, Inc., for non-dominant treatment of the domestic services of international record carriers (IRCs). We issued a *Second Further Notice of Proposed Rulemaking*, FCC 82–187 (released April 21, 1982), 47 F.R. 17308 (April 22, 1982), in which we sought comment on treatment of the domestic operations of IRCs as non-dominant. Over sixty parties filed comments after we issued the *Further Notice*. But, we do not address here the petitions of American Telephone and Telegraph Company (AT&T) and MCI International Telecommunications Corp. for non-dominant treatment of certain international services, or AT&T's

5. This Order clarifies the analysis on which our determinations in this proceeding are based and finds that the following carriers lack substantial market power in interstate, domestic, interexchange telecommunications services: miscellaneous common carriers (MCCs); domestic satellite carriers (domsats); domsat resellers; domestic operations of WU, international record carriers, and other record carriers; and interexchange carriers affiliated with exchange telephone companies.[6] We classify these carriers as non-dominant, along with specialized common carriers and terrestrial resellers previously classified as non-dominant. We conclude that streamlined regulation should be applied to all these carriers not treated by forbearance in their interstate, domestic, interexchange services (including domestic services to Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points). Further, we conclude that we should forbear regulating all resellers, including domsat resellers and resellers affiliated with exchange telephone companies, and specialized common carriers.

II. *Methods of Market Power Analysis*

A. *Definition of Market Power*

6. As we explained in the *First Report* and *Second Report*, full regulatory scrutiny under Title II of firms lacking market power can impose costs on these firms and consumers without offsetting benefits.[7] We do not believe that such regulation promotes the purposes of, or is required by, the Communications Act. Identification of firms to which we will apply streamlined Title II regulation depends on a clear definition of market power. In addition, the

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Petition for Further Rulemaking for non-dominant treatment of specialized satellite services. We will seek comments on AT&T's petition regarding domestic specialized satellite services in the context of the Inquiry into long-run regulation of AT&T's basic domestic interstate services adopted today. FCC 83–482.

[6] Exchange telephone companies include independents and the Bell Operating Companies. The extent to which the BOCs provide interstate services is restricted by the Modified Final Judgment and the delineation of LATAs. *See* United States v. AT&T, 524 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). This Order analyzes the market power of carriers in interstate, domestic, interexchange services. This Order does not streamline the regulatory scrutiny under Title II of the BOCs' intraLATA, interstate services, treated as exchange services by the MFJ. It is likely that the BOCs will face less competition in intraLATA services than in any interLATA services they are allowed to engage in under the MFJ or by waiver thereof. It is possible that we will streamline our regulation of the BOCs' interstate, intraLATA services in a subsequent order if we find that the BOCs face sugstantial competition in these services.

[7] 85 FCC 2d at 20; 91 FCC 2d at 67. The Commission's overriding responsibility is to promote the public interest, not just to maximize competition. Competition can promote the public interest by preventing "supracompetitive price pressures that the Commission might not be able to perceive or control" and by spurring "greater technological advances and more efficient operations." United States v. FCC, 652 F.2d 72, 104 (D.C. Cir. 1980).

analysis of domsats and domsat resellers in this Order requires that we discuss the relationship of economic rents to market power. The application of the analysis in paras. 8–11 to domsats and domsat resellers will be discussed in para. 21.

7. The basic concept of market power is "the ability to raise prices by restricting output"[8] In a competitive market, a firm finds it unprofitable to restrict its output; if it did, some of its potential buyers simply would turn to alternative suppliers which stand ready to sell to them at the competitive price. A decision by a firm lacking market power to restrict its output does not significantly lessen output in the market, and thus does not raise prices in the market. In contrast, a firm possessing market power may find it profitable to restrict its output to a level below what it would supply in a competitive market. Without sufficient close alternative suppliers, enough of its potential buyers will pay a supracompetitive price for the smaller output that the firm's total profits will rise. In this case, the firm has the ability to restrict market output, raise market prices, and impair consumers' welfare.[9]

8. Another, consistent definition of market power focuses on the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.[10] For purposes of this test, the competitive price is based on opportunity cost, not historical cost.[11] In some markets, a

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[8] II P. Areeda & D. Turner, Antitrust Law 322 (1978); Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1, 20 (1979) (holding that a price fixing arrangement that did not restrict output was not a *per se* violation of the antitrust laws). Market power can be possessed by a firm or by a group of firms acting jointly. Economists generally assume that there is an inverse relationship between the quantity of a product produced and the market-clearing price. If a firm with market power restricted its output, the market-clearing price (the price which equates the decreased amount supplied with the quantity demanded) would rise above the competitive level; the firm would be able to sell the decreased amount of output at a higher price. If a firm with market power raised its price, the quantity of its product demanded and hence its sales (output) would fall. Competitive firms produce the amount of output at which their marginal cost equals the competitive price. This definition of market power refers to restrictions of output below this amount.

[9] *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription,'" *quoting* R. Bork, The Antititrust Paradox 66 (1978).). The antitrust laws are a component of the public interest standard in the Communications Act. United States v. FCC, *supra* note 7, 652 F.2d at 81–82.

[10] Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L Rev. 937 (1981); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982); H&B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 243 (5th Cir. 1978); I A. Kahn, The Economics of Regulation 65–66 (1970).

[11] To illustrate this distinction, the opportunity cost of using a satellite transponder to provide a given service is what society must give up to have the transponder used for this service instead of the next-most valuable service (the transponder's current fair market value absent regulation); the transponder's historical or book value reflects what the supplier paid to make the transponder operational.

firm earns "economic rents" because it possesses a scarce resource obtained at less than its current market value (opportunity cost).[12] Its average cost of production, based on historical cost, may be lower than that of other firms in the market because of the scarce resource. But, these rents should not be confused with profits attributable to market power. The difference is that monopoly profits generally result from artificially decreased market output while economic rents do not.[13] Consider the price at which the quantity supplied in the market equals the quantity demanded. Suppose that the output of a firm possessing a scarce resource cannot at that price satisfy the entire market demand. Since the market price would be determined by the higher-cost firms that account for the remaining output, the firm would earn supracompetitive profits (economic rents) based on its historical cost. But, it would *not* be profit maximizing for the firm to supply less than it would if it were unable to earn economic rents. It would produce the amount at which price is based on opportunity cost. Any attempt to produce less would simply allow other suppliers to expand their output or enter at the going price. Under these conditions, the firm lacks market power. The supracompetitive-price approach to defining market power must be applied precisely so that economic rents are distinguished from monopoly profits, *i.e.*, so that price reflects opportunity rather than historical cost.

Among the factors which cause the opportunity cost of using transponders to depart from their historical cost is that there was no charge for scarce orbital slots, there have been improvements in the technology for using transponders, and there have been changes in the supply of and demand for transponders. According to Professor Stigler, "the cost of any productive service to use *A* is the maximum amount it could produce elsewhere. The foregone alternative is the cost." G. Stigler, The Theory of Price 105 (3rd ed. 1966). Our use of marginal cost based on opportunity cost is limited to evaluating a firm's market power; we do not adopt this standard for purposes of determining the cost of a service provided by a dominant carrier. Our cost allocations for ratemaking purposes remain unchanged. *See* AT&T, Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, *reconsid.*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982), *revised*, FCC 83–374 (released Aug. 22, 1983).

[12] Professor Areeda explains economic rents as follows: Suppose firm Q has lower production costs and higher profits than the other firms in its industry. "If Q attempts to increase his output, his costs on incremental output will approach those of his competitors. Q might, for example, refine copper from high grade ore deposits; to expand production he might have to turn to ordinary ore which would mean customary costs and profits. In this case, Q does not control the market. (His high profits are said to be 'economic rents.')" P. Areeda, Antitrust Analysis 243 (3rd ed. 1981).

[13] In discussing a coal severance tax, the Ninth Circuit noted that "'[e]conomic rent' is the amount of revenue that can be extracted from an activity, here in the from of royalties and taxes, without significantly discouraging production." Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1113 n.12 (9th Cir. 1981), *mod.*, 665 F.2d 1390 (9th Cir. 1982). *See also* S. Breyer, Regulation and its Reform 21 (1982). Monopoly profits do not decrease market output when the monopolist engages in perfect price discrimination.

9. To illustrate the relationship between economic rents and output, suppose that a wheat farmer has cheap, unusually-fertile land but produces only a small share of the wheat available to his buyers. Perhaps he acquired the land from a seller that did not recognize its fertility, resulting in a cost to the farmer below its fair market value; at that cost, the farmer will be able to earn economic rents.[14] He can sell his profit-maximizing output at the competitive price (determined by the marginal cost of his rival farmers) and earn high profits viewed from the perspective of his historical costs. If he restricts his output and attempts to charge a supracompetitive price (above the marginal cost of his rival farmers), potential buyers will turn to other farmers charging the competitive price. Market output and prices will not be affected by this action, leading to the conclusion that the farmer lacks market power even though he can earn economic rents (high profits). The farmer could not increase his profits by restricting his output to less than he would have produced at the competitive price. The scarce resource is efficiently utilized even though the farmer earns high profits.

10. The distinction between economic rents and monopoly profits also can be analyzed from the perspective of consumers' welfare. While cost-based rate regulation can attempt to eliminate one producer's economic rents, such regulation will not benefit consumers unless it controls each link in the chain of supply. Returning to the farmer whom can earn economic rents, suppose that his wheat is sold to a grain dealer at the market (competitive) price, then to a processor, then to a wholesaler, then to a retailer, and finally to consumers. Rate regulation can attempt to restrain the farmer's profits to a competitive level by valuing his land at less than its fair market value (opportunity cost), such as at his historical cost, and requiring that he lower his price. But, then the grain dealer buying from this farmer will acquire wheat at below the market price. The grain dealer's rivals will buy from farmers charging the higher, market-clearing price. The arrangement allows this grain dealer to earn economic rents in selling at the market-clearing price to processors unless rate regulation also covers his activities. The same analysis applies further down the chain of supply. Consumers will benefit from regulation of the farmer's potential economic rents only if regulation covers all activities from farming to retailing, inclusive. In the absence of such regulation, it does not harm consumers to allow the farmer to earn economic rents; if he doesn't, someone else will and the price paid by consumers ultimately will be determined by market forces involving the entire chain of supply.[15] On the other

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[14] Acquisition of a scarce license or franchise at a price below its market value leads to an analogous result.

[15] The Federal Energy Regulatory Commission (FERC) encountered a similar problem of flow through to intended beneficiaries under the Natural Gas Policy

hand, suppose that the farmer is a monopolist and the other links in the chain of supply are all competitive. Regulation which prevents only the farmer from earning monopoly profits will lower prices to consumers; there will be no opportunity for any other supplier to earn supracompetitive profits.

11. Another distinction between regulation of economic rents and of monopoly profits goes to the selection of buyers for the output of the regulated firm. Regulation of economic rents results in one firm's output priced below the market level. Demand for the firm's product at that price would exceed its output. A method for allocating its output would have to be developed. What characteristics of potential buyers should be evaluated? How are buyers chosen? Lucky buyers from this low-priced firm would earn windfall profits. Generally, economic efficiency is promoted by allowing a scarce product to be allocated among potential buyers by price; potential buyers will bid up the price until demand equals supply and the product will go to firms who will make the most productive use of it or to consumers who will derive the greatest benefit from it.[16] For a firm with a scarce resource but without market power, demand for

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Act of 1978. FERC expressed its preference for "end-use" plans to distribute natural gas according to the needs of the ultimate consumers. However, since such "plans only covered direct customers of interstate pipelines, there was no assurance that natural gas allocated to a distributor based on the high priority status of his customers would actually reach the preferred end-users." Process Gas Consumers Group v. United States, 694 F.2d 778, 784 (D.C. Cir. 1982). In Reynolds, *A Free Market in Energy*, in R. Poole, Jr. (ed.), Instead of Regulation 67, 74 (1982), the author observed:

> Trying to keep the prices of gasoline down by holding down the price of domestic crude oil was always quixotic—like trying to keep the prices of steel appliances down by holding down the price of domestic iron ore. There are too many steps in processing and distributing to ensure that the full effect will be passed on to final consumers. Holding down the price of domestic crude oil may lower the costs of those engaged in refining or marketing and may also affect the markets for foreign crude oil or refined products, but it is far from obvious that ultimate consumers will capture the whole difference between the controlled and uncontrolled price of crude oil.

[16] *See* M. Friedman, Price Theory 17–18 (1976); R. Leftwich, The Price System and Resource Allocation 344–47 (5th ed. 1973); I A. Kahn, *supra* note 10, at 65–66. In Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973), the authors concluded that the Federal Power Commission's tiered or vintaged regulation of producers' prices resulted in a shortage of natural gas which was borne disproportionately by home consumers.

> To make [classifications of end-users' needs] without reference to users' "willingness to pay," as measured by prices bid by users for the low-priced gas, is difficult, to say the least. In short, tier price regulation requires extraordinary sensitivity to changes in supply in order to react with necessary price changes, and, even in the best conditions, it requires also a complicated rationing procedure.

Id. at 951. Some of the problems of administering a non-price rationing scheme for its product equals its supply (output) at the competitive price, which the firm would have charged in the absence of regulation. In contrast, regulation of monopoly profits results in a price level which equates supply and demand and does not create allocation problems as long as the regulated price equals the competitive price.

12. To summarize paragraphs 8–11, regulation of firms that can earn economic rents does not promote the public interest in efficient allocation of resources as may regulation of firms able to earn monopoly profits by restricting output. Rather, regulation eliminating a firm's ability to earn economic rents does not increase output;[17] does not decrease prices to consumers when unregulated intermediate suppliers are present; and can create difficult allocation problems and resulting inefficiencies. We will return to the discussion of economic rents in our analysis of domsats and domsat resellers, para. 21 *infra*.

B. Definition of the Relevant Market

13. Inferences about a firm's market power can be drawn from a variety of indicia, none of which is perfect. Rough indicators of a firm's market power often used by courts are the level[18] and change[19] in its share of a relevant market, and barriers to entry into the relevant market.[20] A relevant market, or "area of effective

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scarce resources were discussed in State of North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978). *See also* Reynolds, *supra* note 15, at 78 (oil controls imposed on the U.S. economy a sizeable loss of efficiency).

[17] On the contrary, regulation eliminating economic rents can shrink supply. Referring to housing rent control, Breyer and MacAvoy observed that "it is extraordinarily difficult to bring about the transfer of excess profits [from owners to tenants] without affecting output [discouraging new building]." Breyer & MacAvoy, *supra* note 16, at 951. "In the long run houses can be built and maintained only with resources that have many other uses, and no scheme of financing can avoid the alternative costs of these resources." G. Stigler, *supra* note 11, at 108.

[18] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); Broadway Delivery Corp. v. United Parcel Service of America, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) ("a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power"); Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1387 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981) (firm with a very small share of the relevant market [total automobile sales] has insignificant market power); U.S. Department of Justice, *Merger Guidelines-1982*, 2 Trade Reg. Rptr. (CCH) para. 4500; Landes & Posner, *supra* note 10, at 938.

[19] A declining market share may indicate the absence of market power. Greyhound Computer v. IBM, 559 F.2d 488, 496 n.18 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); United States v. International Harvester Co., 274 U.S. 693, 709 (1927); United States v. United States Steel Corp., 251 U.S. 417, 439 n.1 (1920).

[20] Successful entry indicates that the market shares of existing carriers are falling and that those carriers have not excluded competition, suggesting the absence of market power. *See, e.g.*, U.S. Department of Justice, *supra* note 18, at para. 4503;

competition,"[21] has product and geographic dimensions. Relevant markets should be delineated to include close demand and/or supply substitutes for a firm's product.[22] This section explains our finding that, for purposes of assessing the market power of the carriers covered by this proceeding,[23] (1) interstate, domestic, interexchange telecommunications services comprise the relevant product market, and (2) the United States (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) comprises the relevant geographic market for this product, with no relevant submarkets.[24]

Relevant Product Market

14. We first turn to the relevant product market, the set of services which check the ability of a carrier to restrict its output of a service and thereby raise its price. In the *Further Notice*, we tentatively found that there are three product markets for interstate, domestic interexchange telecommunications services—MTS/WATS, private line, and public switched record.[25] Many parties criticized this tentative finding for departing from the analysis of supply and demand substitutes in defining relevant markets.[26] We now believe that these different types of interstate,

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ILC Peripherals v. IBM, 458 F. Supp. 423, 431 (N.D. Cal. 1978), *aff'd per curiam sub nom.* Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965, 981–82 (N.D. Cal. 1979), *aff'd sub nom.* Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir. 1983); United States v. FCC, *supra* note 7, 652 F.2d at 106; Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1254 (1982), *appeal pending sub nom.* Wold Communications, Inc. v. FCC, D.C. Cir. No. 82–2054 (appeal filed Sept. 10, 1982); P. Areeda, *supra* note 12, at 20–22, 242–43.

[21] Standard Oil Co. v. United States, 337 U.S. 293, 299–300 n.5 (1949). *See also* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).

[22] *See, e.g.*, U.S. Department of Justice, *supra* note 18, at para. 4502; United States v. Continental Can, 378 U.S. 441 (1964); *du Pont, supra* note 21, 351 U.S. at 394; United States v. Columbia Steel Co., 334 U.S. 495, 510–11 (1948); Twin City Sportservice v. Charles O. Finley, 512 F.2d 1264 (9th Cir. 1975); Spectrofuge v. Beckman Instruments, 595 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); Landes & Posner, *supra* note 10, at 944–52; F. Scherer, Industrial Market Structure and Economic Performance 60–61 (2d ed. 1980).

[23] The carriers covered by this proceeding are MCCs; domsats; domsat resellers; domestic operations of WU, IRCs, and other record carriers; interexchange carriers affiliated with exchange telephone companies; specialized common carriers; and terrestrial resellers.

[24] Different relevant markets may be appropriate when assessing the market power of other carriers because their buyers may face a different set of demand and supply substitutes. For example, this geographic market is clearly inappropriate for assessing the market power of carriers in their international services. Pursuant to our step-by-step approach in this rulemaking, we do not consider here the appropriateness of applying this market definition in assessing the power of AT&T. The appropriate market definition for assessing the power of AT&T will be examined in the AT&T Inquiry adopted today. FCC 83–482.

[25] 84 FCC 2d at 501.

domestic, interexchange telecommunications services are in the same product market because they are close demand and/or supply substitutes. For reasons described *infra*, we find that—for purposes of assessing the competitive checks on the prices charged by the carriers covered by this proceeding—all interstate, domestic, interexchange telecommunications services comprise a single relevant product market with no relevant submarkets.

15. Regarding demand substitutability, we recognized in *Second Computer Inquiry*[27] and *MTS/WATS Market Structure*[28] that many consumers substitute to public switched telecommunications services (MTS/WATS) from private line and public switched record services. There is also substantial substitution from MTS/WATS to private line and public switched record services. Nor do different transmission media demarcate different product markets; in *Satellite Business Systems*[29] we found that services provided by satellite and terrestrial communications systems are reasonably interchangeable to many customers. Increasingly, customers purchase bandwidth capacity, not a service for a specific type of transmission or a service provided by a specific transmission medium. Many carriers offer integrated voice/data/facsimile/video communication services. We find that customers switch among types of services and suppliers in response to their relative mixes of quality and price.[30] While there may be some limits to demand substitutability for certain services, there are sufficient demand or supply linkages to justify treating

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[26] *See, e.g.,* SBS Comments on Further Notice 17, 23 ("While [MTS] is normally viewed as a two-way voice telephone service, it is in fact capable of handling and does handle data, record, and facsimile communications requirements as well, without modification . . . . [MTS is] an effective substitute for most specialized or geographically limited voice, data, record, facsimile, and videoconferencing services whether of the dedicated private line or switched variety."); AT&T Comments on Further Notice 39; Western Union Petition for Reconsideration; NTIA Petition for Reconsideration; Department of Justice Comments on Second Further Notice; Comments of the Council on Wage and Price Stability (COW PS) 3; Comments of Centel at 10. The only comment supporting three product markets comes from U.S. Telephone and Telegraph.

[27] 77 FCC 2d 384, 419, *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) ("More and more the thrust is for a carrier to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission.").

[28] 81 FCC 2d 177, 203 (1980), 48 F.R. 10319 (1983), *reconsid.*, FCC 83-356 (released Aug. 22, 1983).

[29] 62 FCC 2d 997, 1078–82 (1977), *aff'd sub nom.* United States v. FCC, *supra* note 7 (Satellite and terrestrial channels compete, as do analog and digital channels.).

[30] *See id.* at 1077–78 (tariff classifications need not be determinative of relevant market boundaries); AT&T Comments on Further Notice 39 ("most business customers could use MTS/WATS instead of private line if the price were right"). Customers can use the MTS network to provide for themselves services that we have placed in other markets. *See* comments cited in note 23 *supra*.

them as being in a single product market. We will consider some specific cases of demand substitutability later in this section.

16. The key fact regarding supply substitutability is that there are low barriers to entry across services. We concluded in the *Further Notice* that, within very broad limits, telecommunications transmission media—wire pairs, coaxial cable, terrestrial microwave, fiber optics, or satellite transponders and earth stations—can be adjusted readily to provide virtually any service efficiently.[31] The major limitation is that the facilities must have sufficient bandwidth to accommodate the desired service. Satellite and terrestrial facilities readily can be switched among voice, data, facsimile, and video services, private line and switched services, and point-to-point and point-to-multipoint services. While there may be some limits to supply substitutability for certain services, there are sufficient demand or supply linkages to justify treating them as being in a single product market. Some specific cases of supply substitutability will be considered later in this section.

17. The nationwide interstate telecommunications network essentially operated by AT&T is comprised almost entirely of high-capacity carrier systems with ample bandwidth to accommodate all varieties of services now offered.[32] In addition, specialized common carriers have substantial, rapidly-expanding, high-capacity transmission facilities.[33] These networks provide close demand and supply substitutes for the services of the carriers covered by this proceeding. Some carriers use satellite capacity to provide MTS/WATS and private line voice, data, record, and video services in competition with services provided by these networks' terrestrial facilities. Other carriers, including WU and the IRCs, provide a wide range of

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[31] 84 FCC 2d at 501. While there may be regulatory barriers to supply substitutability and entry in intrastate and foreign telecommunications services, we have removed many of these barriers in interstate, domestic telecommunications services.

[32] We found in Docket No. 18128 that when AT&T plans its facilities, it plans basic capacity that is only assigned to individual services as required. AT&T: Manual Procedures for the Allocation of Costs (CC Docket No. 79–245), 78 FCC 2d 328 (1980). For example, AT&T uses its T1 carrier system to provide its Dataphone Digital Service (DDS) at 1.544 Mbps or, using multiplexing, multiple data transmissions at lower speeds. It also uses the same facility for twenty-four 56 kbps voice channels for use in MTS/WATS services. Its terrestrial microwave radio facilities are used to provide a full range of services from video programming private line distribution to MTS/WATS. *See* Bell System, Engineering and Operations of the Bell System 333, 428–33 (1977).

[33] In 1982, the value of gross communications plant owned by specialized common carriers was about $1.4 billion. Letter from Common Carrier Bureau to Rep. Wirth, Chart 3 (July 8, 1983). Based on the analysis in the *First Report*, 85 FCC 2d at 28–29, we find that specialized common carriers and terrestrial resellers are in the relevant product and geographic markets defined in this Order.

services by reselling facilities acquired from AT&T, independents, and specialized common carriers.[34] Finally, our interconnection and resale orders have significantly decreased barriers to entry into and expansion in all interstate, domestic interexchange services.[35]

18. We next consider some specific examples of demand and supply substitutability. In the *Further Notice*, we concluded that MCCs using terrestrial microwave systems face competition for carrying audio and video programming to cable TV systems and broadcasters from satellite resellers, Cable Television Relay Stations (CARS), and direct over-the-air reception at the cable headend.[36] United Video's petition for reconsideration of our *First Report* and our recent experience with MCCs' tariff revisions and termination-liability charges as their customers turn to alternative suppliers support this conclusion.[37] For example, one cable TV operator, Teleprompter of Graham, Texas, receives signals off-the-air from affiliates of all three networks, receives Showtime Entertainment and WTBS (Atlanta) via satellite using its own earth station, and switched in 1979 from a MCC to CARS to receive Dallas-Ft. Worth television stations.[38] During recent years the number of cable

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[34] WU Reply Comments to Further Notice 9; RCAG FCC Form R 86 (1981)

[35] Regarding switched record services, see WU Comments to Further Notice 13–17; Record Carrier Competition Act of 1981, 47 U.S.C. § 222 (1983); Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928, 91 FCC 2d 483 (1982), *review pending sub nom.* Western Union v. FCC, D.C. Cir. No. 82–1502 (filed May 4, 1982). *See also* Resale and Shared Use, 83 FCC 2d 167 (1980), *recon.*, 86 FCC 2d 820 (1981) (MTS/WATS Resale Decision); Resale and Shared Use, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); MTS/WATS Market Structure, Phase III (CC Docket No. 78–72) (released May 31, 1983).

[36] 84 FCC 2d at 511–14. *See also* Satellite Business Systems, *supra* note 29, 62 FCC 2d at 1079 (Satellite and terrestrial services compete for simultaneous transmission to multiple receivers.). In the *First Report*, 85 FCC 2d at 27–28, we observed that MCCs often provide service to remote points not served by other video interconnection methods. However, we also noted that there is declining demand for terrestrial video interconnection. We stated that we would revisit our regulation of MCCs in the near future to determine whether increased competition warranted streamlining for MCCs. We now find that competition justifies treating MCCs as non-dominant.

[37] "Within the last 36 months, 26 cable television customers have substantally reduced or terminated entirely their microwave service. Thus, out of approximately 100 total customers, over 20 percent have been lost to direct competition from satellite service." Urgent Petition of United Video, Inc., for Immediate Reconsideration 3 (Dec. 29, 1980). *See, e.g.*, West Texas Microwave Co., FCC 83–307 (released July 6, 1983), *affirming* Mimeo No. 3497 (released April 22, 1982); Eastern Microwave, Mimeo No. 4351 (released May 25, 1983). *See also* Comments of Garden State (competition in supplying independent television signals).

[38] Television and Cable Factbook 1981–82 Edition (Services Volume) 1178-a; CARS license files; West Texas Microwave Co., FCC Form P, 1979, 1980. Teleprompter, in its Comments to the Further Notice at 33, cites its system in Graham, Texas, as subject to the market power of MCCs. The evidence shows that this cable system has close or even superior substitutes for MCCs.

television systems has grown sharply while the MCCs have grown little or even declined,[39] suggesting that there are effective alternatives to MCC services for cable TV systems. The number of satellite carriers and satellites carrying video signals has grown, and there are over 6000 receive-only earth stations serving cable TV systems and over 300 more serving broadcast stations.[40] Earth stations with the capability to receive signals from many satellites are available, and existing earth stations can be so modified without great cost.[41] ABC, CBS, and NBC are already distributing, or have announced plans to distribute, network signals via satellite.[42] After reviewing all of these facts, we reject claims that MCC services comprise a distinct relevant product market or submarket[43]

19. Similarly, domsat and domsat-reseller services do not comprise a distinct relevant product market or submarket. Voice, data, record, and video services are offered by both satellite and terrestrial carriers in private line as well as switched, and point-to-point as well as point-to-multipoint arrangements. The costs of terrestrial and satellite transmission overlap for many services, depending on the service characterisics and origin-destination(s). The availability of terrestrial alternatives provides a competitive check on the quality/price mix offered for many satellite services.[44] Such services comprise a large portion of the services of domsats and domsat resellers. For example, SBS's MTS-like service (Skyline) competes closely with terrestrial MTS and MTS-like services provided by AT&T, specialized common carriers, and terrestrial resellers. Also, many point-to-point private line services are priced similarly by satellite and terrestrial carriers.

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[39] Between 1977 and 1981 the number of cable systems operating went from 3800 to 4600. FCC Annual Reports 1977, 1981. During the same period the video transmission revenues of the MCCs that are not also domsat resellers (*i.e.*, excluding Southern Satellite System, Wold Communications, Eastern Microwave, and United Video) fell from $22.3 million to $22.1 million. FCC Form P, 1977, 1981. *See also* United Video Petition, *supra* note 37, at 3 (because of competition from domsats, domsat resellers, and CARS, MCCs have few, if any, new customers).

[40] *See* notes 47–49 *infra*; Broadcasting 72 (March 28, 1983).

[41] *See* Reply Comments of Home Box Office 19–23; Broadcasting (back cover) (Aug. 8, 1983) for advertisement of Antenna Technology Corp. regarding a multi-beam antenna that can simultaneously see all domestic satellites with consistent broadcast-quality performance. The ad states that this product has over 200 nationwide customers.

[42] Broadcast Management/Engineering 42, 50 (Jan. 1983); Satellite Week 2 (May 31, 1982).

[43] *See* Garryowen Corp. Comments and Reply Comments to Further Notice; Teleprompter Comments to Further Notice; NCTA Comments and Reply Comments to Further Notice.

[44] *See* Comments of American Satellite, stating that satellite services must be priced substantially below comparable terrestrial services offered by AT&T to attract customers, effectively eliminating the margin between satellite transmission costs and prices for satellite services.

20. Domsats and domsat resellers have a cost advantage over terrestrial carriers for some services, such as certain point-to-multipoint video services (supplying cable TV systems).[45] But, as explained in paras. 8–9, this does not mean that these satellite services comprise a separate relevant product market. Nor does it mean that any domsat or domsat reseller has market power. There is close supply substitutability between using many transponders for point-to-point and point-to-multipoint services; flexibility is inherent in satellite technology. Many domsats supply transponders under the same tariff for any usage. Some satellites carry a wide variety of services for a wide variety of origin-destination arrangements.[46] Total satellite usage is split, with large amounts of voice, data, facsimile, and video transmissions and different distribution arrangements. New entry is occurring into all aspects of satellite services.[47] Furthermore, earth stations capable of receiving signals from many satellites have increased intersatellite competition.[48] If

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[45] *See First Report*, 85 FCC 2d at 26–27. Various parties argued tht domsats and domsat resellers operate in a separate market for video programming distribution to cable TV systems and that there are barriers to entry into that market. Comments of NCTA, Post-Newsweek, Wold, Hughes Television Network, Viacom, Teleprompter, Eastern Microwave, and Warner Amex. As discussed in para. 18 *supra*, domsats' services, terrestrial crriers' services, and over-the-air transmissions compete in many areas. As ABC, CBS, and NBC shift from terrestrial to satellite distribution (see note 42 supra), the ability of terrestrial carriers to provide point-to-multipoint services to new customers will increase because the carriers will have more spare capacity.

[46] As examples of multi-use satellites, *see* Letter from R. Jacobsen (V.P.-Network Engineering, AT&T) to R. Lepkowski (Chief, Satellite Radio Branch, FCC) on AT&T's satellite usage, p. 6 (Nov. 5, 1982) (same transponders could be used for public switched network and special services, including satellite television service); AT&T: Satellite Television Service, 87 FCC 2d 889, 895 (1981) (allocation of total satellite costs where different transponders used for different services). AT&T's satellite facilities help check the market power of the carriers covered by this proceeding; we express no opinion on AT&T's market power here. *See* AT&T Notice of Inquiry, FCC 83–482.

[47] AT&T in its Petition for Further Rulemaking at 9 presents the following data on FCC approved satellites and transponders: for 1982, 4 carriers, 17 satellites, and 300 transponders; for 1984, 8 carriers, 26 satellites, and 594 transponders; and for 1987, 11 carriers, 38 satellites, and 918 transponders. Brief descriptions of the activities of various domsats appear in *id.* at Appendix B. Ownership of satellite facilities is becoming unconcentrated through new entry and transponder sales. We stated in Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1249, 1255 n.40, 1262–65 (1982), that users at that time could select from four different satellite systems, with four others to be introduced by 1985. Also, 15 different parties purchased the 34 transponders then sold. *See* notes 48 and 49 *infra*.

[48] *See* note 41 *supra*. We reject claims that the services of RCA Americom's SATCOM I comprise a relevant product market. Eastern Microwave Comments 2. *See* RCA American Communications, 89 FCC 2d 1070, 1073 (1982). For example, WU's Westar III and Hughes's Galaxy I both carry cable TV programming. In addition, some purchased transponders can be used to carry video signals. Domestic Fixed-Satellite Transponders Sales, 88 FCC 2d 1419, 1421 (1982) (Hughes proposed to sell 18 of the transponders on Galaxy I to selected programmers exclusively for the purpose of providing video programming

one satellite system attempted to earn supracompetitive profits for, say, point-to-multipoint video services, the transponders of other satellites —previously used for, say, a point-to-point data private line service and priced in close competition with terrestrial alternatives for that service —would be available to supply those services. This supply substitutability among satellite services would drive the price for point-to-multipoint video services down toward the competitive level. For these reasons, all satellite services are in the same relevant product market. As explained in the preceding paragraph, that relevant product market includes terrestrial carriers which check the prices for many satellite services.

21. The preceding analysis of satellite carriers is complicated somewhat by the occurrence in the past of periods during which demand for satellite services at their regulated rates exceeded the capacity of operational satellites. Supply is increasing rapidly through the expansion of existing systems and new entrants.[49] We recently observed that it appears unlikely that future satellite services will have excess demand when they are priced to yield a competitive rate of profit.[50] If demand does not exceed supply at

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primarily to cable TV systems). *See* Reply Comments of Home Box Office 11–23, stating that RCA Americom had a dominant position until recent increases in satellite capacity and capability of cable system operators to have access to multiple satellites.

[49] *See* note 47 *supra*; Assignment of Orbital locations to Space Stations in the Domestic Fixed-Satellite Service (1983) (authorizing the construction of 19 additional domestic fixed satellites and the launch of 19 new or previously constructed satellites, increasing the number of authorized in-orbit satellites to 38 by 1987); Licensing of Space Stations in the Domestic Fixed-Satellite Service (CC Docket No. 81–704) (1983); Domestic Fixed-Satellite Transponder Sales, *supra* note 47, 90 FCC 2d at 1254 ("The entry of new firms and the rapid expansion of capacity of both old and new firms in response to the previous temporary shortage is evidence of the competitiveness of [the domsat] industry."); Orbit Deployment Plan, 84 FCC 2d 584 (1981). Many commenting parties did not anticipate the great increase in domsat capacity from our two-degree spacing order. *See, e.g.*, Comments of Flynn; Domestic Fixed-Satellite Transponder Sales, *supra* note 47, 90 FCC 2d at 1250 n.28 (studies by ITT and WU in 1979 did not accurately account for the supply and technological advancements now occurring). *Compare* Reply Comments of Hughes 6–12 (transponder capacity will triple in next three years because of newly-authorized satellites, eliminating shortage of supply). In the *First Report*, 85 FCC 2d at 26–27, we noted that, in 1980, demand for transponder space exceeded supply, leading us to classify domsats as domimant. Since that time, advances in satellite technology, regulatory decisions, and new entry have greatly expanded satellite supply.

[50] Domestic Fixed-Satellite Transponder Sales, *supra* note 47, 90 FCC 2d at 1254. RCA Americom filed a revised tariff on June 10, 1983, with proposed rates for transponder leases substantially lower than its $13 million Fixed Rate offering filed on February 18, 1982. RCA Americom cited "a softening in the marketplace and general economic conditions." (Transmittal No. 454).

Present and future competition faced by domsats appear greater than past competition faced by domsats. We found unlawful various tariff revisions proposed by RCA Americom in 1980 and 1981. RCA American Communications, 84 FCC 2d 353 (1980), 86 FCC 2d 1197 (1981) (unfair alteration of long-term service tariffs); RCA those prices, satellites will compete with terrestrial carriers for a wide range of services. Suppose, however, that excess demand would occur for satellite services at those prices during some (perhaps short) period of time. In the absence of historical-cost-based rate regulation, satellite carriers could raise their prices so as to earn economic rents. Their high profits would be attributable to the use of scarce resources (satellites and orbital slots) which produce a cost advantage over rival suppliers (terrestrial carriers). Yet, the possible emergence of economic rents for satellite carriers does not warrant placing any or all of them in a separate relevant product market and concluding that domsats possess market power.[51] Rates charged for terrestrial services would place a ceiling on rates for lower-cost satellite services.[52] As explained in paragraphs 8–11 *supra*, the ability to earn economic rents but not satisfy the entire market demand will not give satellite carriers the incentive to restrict their output or charge a price different than they would charge absent economic rents;[53] regulation of satellite carriers' profits will not necessarily benefit consumers;[54] and such regulation would generate difficult allocation problems (*e.g.*, long, inefficient queues).[55] The economic rents will encourage further expansion and entry of

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American Communications, 84 FCC 2d 781 (1981), 86 FCC 2d 1208 (1981) (unjustified "bonus" allocation scheme given while there were many potential customers for the domsat's transponders); RCA American Communications, 89 FCC 2d 1139 (1982) (discrimination in auction scheme). *See also* RCA American Communications, 74 FCC 2d 531 (1979) (Commission required domsat to tariff its transponder allocation procedures in response to complaints that the carrier's procedures were unreasonable in violation of Sections 201 and 202).

[51] *See* Twin City Sportservice, *supra* note 22, 512 F.2d at 1272 (food concession at baseball park part of the general concession franchise market even though baseball concessions produce the highest total concession revenues, highest per capita concession revenues, and highest profits in all sports).

[52] *See* note 44 *supra*.

[53] The Department of Justice and Federal Trade Commission commented in Domestic Fixed-Satellite Transponder Sales, *supra* note 47, 90 FCC 2d at 1254, that domsats lack the market power required to impair the reasonable availability of transponder supply.

[54] *Further Notice*, 84 FCC 2d at 507 (Because many domsat customers are resellers supplying cable systems and program distributors, "consumers may be receiving only minor benefits from a cost-based satellite transmission service.").

[55] As general support for use of market-clearing prices to allocate scarce satellite resources, we have stated that "our policy of relying upon marketplace forces to shape the evolution of satellite telecommunications has proved very fruitful over the years." Domestic Fixed-Satellite Transponder Sales, *supra* note 47, 90 FCC 2d at 1249. RCA Americom's efforts to overcome allocation problems started with a first-come, first-served procedure, then a lottery, and later an auction. RCA American Communications, 89 FCC 2d 1139, 1141, 89 FCC 2d 1070, 1077 (1982). *See also* AT&T: Satellite Television Service, *supra* note 46, 87 FCC 2d at 839 (party questioned whether AT&T would implement its first-come, first-served allocation procedure fairly).

satellites, including through technological innovation in the use of transponders, spectrum, and orbital positions.[56] For all these reasons, we conclude that domsats and domsat resellers do not comprise a separate relevant product market or submarket. The same analysis applies to carriers providing satellite earth station services (uplinks and/or downlinks, but no satellite transmission channels). These carriers supply services and utilize facilities similar to, but more limited than, those of domsats and domsat resellers.

22. We also conclude that WU's domestic Telex/TWX and Mailgram record services have close demand substitutes and do not comprise a separate relevant product market or submarket. WU's comments have presented a great deal of evidence supporting the view that there are many reasonable demand substitutes for Telex/TWX, including (1) domestic teletypewriter exchange services of other carriers, such as IRCs, including IRCs' services interconnected with WU; (2) facsimile, sophisticated terminals, communicating word processors, and other forms of record telecommunications; (3) private line voice and data services; and (4) switched voice services offered by AT&T and other carriers. In their comments in this proceeding, WU, NTIA, and COWPS argue that these substitutes effectively constrain WU to price competitively. Telex/TWX overlaps in price, delivery time, and quality with other services for messages of various lengths, and there is a high rate of migration from Telex/TWX to other carriers' services.[57] WU has shown that most segments of its customer base employ or had employed a variety of alternatives to Telex/TWX, and many of its customers do not need access to the large number of terminals on the Telex/TWX network or the directory service. Entry, interconnection, and resale have increased the competition facing WU, especially after passage of the Record Carrier Competition Act in 1981.[58] We reject the view

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[56] *Id.* at 1254 (possible technical refinements to increase the number of services that can be provided within the limits of the usable spectrum and orbit include multiple spot beams and bandwidth compression techniques); *Further Notice*, 84 FCC 2d at 507–08, 510 (market-clearing price may provide incentive for investments in research, development, and implementation of more efficient technologies which would not occur at lower price).

[57] *See* Diebold Group, Western Union Telegraph Co.: Competitive Data Communications Study 2, 29 (1980), submitted as appendix to Western Union Comments; NTIA's Petition for Reconsideration at 2 (services of Wiltek and Scientific Timesharing using teleprinter terminals and services of Southern Pacific, ITT, and Graphnet using store-and-forward facsimile are reasonable substitutes for hard copy record services of WU). According to WU's Petition for Reconsideration at 10, AT&T has at least 300,000 low-speed teletypewriter terminals and a large number of data terminals on its network, as compared to 100,000 to 150,000 terminals on the Telex/TWX network.

[58] *See* note 35 *supra*; Graphnet Systems, 71 FCC 2d 471 (1979), *aff'd sub nom.* Western Union Telegraph Co. v. FCC, 665 F.2d 1112 (D.C. Cir. 1981); Interconnection Arrangements Between and Among Domestic and International Record Carriers, *supra* note 35; Record Carrier Competition Act, 47 U.S.C. § 222. In the

that only those services matching extremely detailed descriptions of the capabilities of Telex/TWX are in the same market, or that the large network of subscribers for Telex/TWX confers market power on WU.[59] For the same reasons, the domestic services of IRCs and other record carriers are in the same relevant market of interexchange telecommunications services.[60] Other domestic interexchange telecommunications services provided by WU are also in this relevant product market.

23. Exchange telephone companies have moved toward providing interexchange telecommunications services outside their partnership arrangements with AT&T Long Lines. As examples, Rochester Telephone Co. and Southland Telephone Co. resell AT&T's Wide Area Telecommunications Services (WATS) through their affiliates; United Telecommunications, Inc. has a controlling interest in ISA Communications, a resale carrier offering satellite digital communications services using Digital Electronic Message Service;[61] Conti-

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Further Notice, 84 FCC 2d at 503, we observe that good supply substitution possibilities exist for WU's Telex/TWX network. Transmission capacity used to provide MTS/WATS can be used to provide a public switched record service. Equipment can be added to these transmission lines to duplicate WU's features such as Infomaster Computers and Centralized Telephone Bureaus. In the *First Report*, 85 FCC 2d at 25–26, we cited our decisions in Public Message Services, 71 FCC 2d 471 (1979), and International Record Carriers (Gateways), 76 FCC 2d 115 (1980), as likely to diminish WU's market power. In RCA Global Communications, 88 FCC 2d 905 (1981), the Commission granted the IRCs permission to provide their own competitive, wholly-domestic record services.

We do not read the Record Carrier Competition Act or its legislative history as finding that a separate relevant market of record services exists for purposes of assessing the market power of carriers. The Act removed certain restrictions on competition directed at telegraph carriers in 47 U.S.C. § 222 (1962). Nor does the Act or legislative history require us to find that any record carrier possess market power.

[59] *See* UST&T Reply Comments to Further Notice 18; UST&T Opposition to WU's Petition for Reconsideration of the First Report 4; RCA Globcom Opposition to WU's Petition for Reconsideration of the First Report 13; Western Union International Comments. The relevant question in defining markets is not whether there are substitutes for a given product that can be used by those who want that particular product with exactly the same specifications and properties. Rather, the question is what are the substitutes which may make it unprofitable for the firm to attempt to raise the product's price to any group of buyers by restricting output. WU is constrained to price competitively even to those buyers who want to communicate with WU's large network of subscribers because of (1) the availability of interconnections for other record carriers and (2) other services that are close substitutes for many messages and customers. *See* Fisher, *Diagnosing Monopoly*, 19 Q. Rev. Econ. & Bus. 7, 15 (1979); In re Data General Antitrust Litigation, 529 F. Supp. 801 (N.D. Cal. 1981); U.S. Department of Justice, *supra* note 18, at para. 4502.

[60] *See* Comments on Further Notice of Department of Justice, RCA Globcom, TRT Telecommunications, Western Union International, and ITT Worldcom.

[61] ISA Communications Services, 90 FCC 2d 938 (1982). ISACOMM provides some services in areas where an exchange telephone company owned by United Telecom is the wireline carrier.

nental Telecommunications, Inc. owns fifty percent of American Satellite; Central Telephone and Utilities Corp. (Centel) is participating in planning a network to connect cable companies in major metropolitan areas (Videopath); and we recently approved General Telephone & Electronics Corp.'s acquisition of Southern Pacific Communications Co.[62] Like the services of other terrestrial and domsat resellers, domsats, and specialized common carriers, these services are in the relevant product market of interexchange telecommunications services because of demand and supply substitutability.

24. To summarize, considerations of demand and supply substitutability show that, for purposes of assessing the power of the carriers covered by this proceeding, there is a single relevant product market of interstate, domestic, interexchange telecommunications services with no relevant submarket.

Relevant Geographic Market

25. The relevant geographic market includes the locations of the suppliers (1) to which buyers in any one area practicably can turn for alternative sources of supply, or (2) which otherwise check the prices charged to those buyers. Locations are included in a relevant market because either buyers in one area practicably can go there to purchase from a supplier as an alternative to purchasing from a given firm (demand substitutability), or a supplier there readily could sell to these buyers by employing existing capacity or developing new plant (supply substitutability).[63] In addition, multiple locations are included in a relevant market when the firm selling to buyers in multiple locations cannot engage successfully in price discrimination against buyers in any location and its rivals in other locations check the firm's prices to all its buyers.[64]

26. A national geographic market for interstate, domestic, interexchange telecommunications services is warranted because of supply substitutability and low entry barriers. The nationwide interexchange network essentially operated by AT&T extends to almost all locations served by carriers covered in this proceeding.[65] This network has alternative routing capabilities, by which transmission capacity between points A and B often can be used in providing service between points C and D. The cost of alternative routing may be similar to that of direct routing. The capacity of this network cannot be segmented into distinct city pairs or even

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[62] Application of GTE Corp. and Southern Pacific Co., FCC 83–269 (released July 1, 1983).

[63] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 331–32 (1961).

[64] U.S. Department of Justice, *supra* note 18, at para. 4502.

[65] Our analysis does not concern the full geographic scope of the IRCs' services, but rather only the points served by the domestic portion of their services.

domestic regions. Other networks, including those operated by MCI, Southern Pacific, and USTS, also have alternative routing capabilities with nationwide or near-nationwide service areas.

27. A satellite has the capacity to serve vast regions of the continental United States, Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points without adjustment and with little cost and time required to install earth stations.[66] The areas served by different satellites overlap and do not fit in neat geographical delineations. Often, satellite capacity readily could be diverted from serving points A and B to serving points C and D, even when the two sets of points are not geographically proximate.

28. Finally, terrestrial carriers have been able to enter and expand rapidly to serve a pair of points by constructing new facilities to supplement their networks,[67] interconnecting, or reselling the services of other carriers.[68] Domsat resellers also have great flexibility in entering into new areas and diverting capacity from one area to another.

29. As for demand substitutability, customers readily shift their purchases from a supplier providing service along a particular route between an origin and destination (say, using specific earth stations and a specific transponder) to a supplier using a different route to serve that origin and destination. The geographic locations comprising a specific route do not constitute a relevant geographic market. Also, many customers consider an interexchange carrier's ability to serve multiple geographic points and its prices for services to all those points when choosing a supplier. In these cases, demand cannot be segmented into distinct city pairs or even regions. For example, a buyer may want a single supplier for Chicago-Houston and Chicago-New York services. In choosing a supplier, he will consider carriers' prices for services to these points. Such patterns of demand across geographic points favor a nationwide geographic market.

30. For all these reasons, we conclude that there is a single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) for

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[66] "[A]dequate capabilities are being built into each satellite system to warrant the assignment of an orbital location capable of serving all 50 states to each carrier in the 4/6 Ghz bands." Orbit Deployment Plan, *supra* note 46, 84 FCC 2d at 597. These satellites generally also can serve other U.S. offshore points. The capacity of many transponders can be switched from, say, mainland-Hawaii to mainland-mainland traffic. Even though there are points in Alaska currently served by only one carrier, other carriers readily could serve these points and they are not in a separate geographic market. *See* RCA Americom's Opposition to Alascom's Petition for Reconsideration (terrestrial facilities could be used to serve points in Alaska and five new carriers have been authorized to operate satellites in orbital slots suitable for providing service to Alaska).

[67] *See* note 33 *supra.*

[68] *See* note 35 *supra.*

interstate, domestic, interexchange telecommunications services with no relevant submarkets. We do not limit the relevant geographic market to the continental United States.

III. *Application of Market Power Analysis*

31. Available data show that the shares of the carriers covered by this proceeding—MCCs; domsats; domsat resellers; domestic operations of WU, IRCs, and other record carriers; interexchange carriers affiliated with exchange telephone companies; specialized common carriers; and terrestrial resellers—in the relevant market we have delineated are small.[69] These small market shares suggest the absence of market power for the carriers covered by this proceeding. In addition, recent entry and expansion of numerous suppliers in competition with the carriers covered by this proceeding suggest that these carriers lack market power.[70] We conclude that these carriers are non-dominant currently and are likely to be so in the future, although some of these carriers may have possessed market power in the past. Non-dominant carriers not treated by forbearance, see paras. 35–37, will be subject to streamlined regulation. The relevant geographic market found here allows us to treat carriers found non-dominant or qualifying for forbearance here or

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[69] In United States v. AT&T, 552 F.Supp. 131, 171 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S.Ct. 1240 (1983), the court noted that AT&T conceded that as late as 1981 its share of interexchange revenues was around 77 percent, with estimates submitted by others higher and some in excess of 90 percent. In 1982, toll service revenues of the Bell System were $33.9 billion; toll service revenues of the Bell System and independents were $42.3 billion; total operating revenues of the specialized common carriers were $1.3 billion (with MCI accounting for $813 million, Southern Pacific for $393 million, and United States Transmission Systems for $128 million); and total operating revenues of the MCCs were $88 million. Letter from Common Carrier Bureau to Rep. Wirth, Charts 4, 5 (July 8, 1983). Satellite Business Systems' 1982 revenues were $39 million. SBS 1982 Annual Report to Stockholders 22. American Satellite's 1982 revenues were $44 million. Continental Telcom 1982 Annual Report to Stockholders 44. WU's 1982 revenues were $305 million for teletypwriter networks, $309 million for private wire, satellite and related services, $102 million for Mailgram services, and $67 million for telegram services. Western Union 1982 Annual Report to Stockholders 20. Among domsat resellers, revenues for 1982 were $10 million for Southern Satellite Systems, $23 million for Wold Communications, $10 million for United Video, and $9 million for Eastern Microwave. FCC Form P's, 9. Among terrestrial resellers, 1982 revenues were $100 million for U.S. Telephone, and $60 million for Combined Network. New York Times (Aug. 21, 1983) Fl. While data are available on the interstate toll revenues of exchange telephone companies, the data do not separate their interstate service revenues from their exchange access service revenues. Although we lack precise data on the annual revenues of some domsats, domsat resellers, domestic services of IRCs, the interstate services of exchange telephone companies, specialized common carriers, and terrestrial resellers, we doubt that any of them not listed above exceed $100 million.

[70] *See* notes 20, 33, 47, 48, 49 *supra.*

previously as such for the entire continental United States, Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points. We amend our rules for initial certification of non-dominant carriers to allow authorization for all domestic points. *See* Appendix revising 47 C.F.R. § 63.07. Furthermore, all non-dominant carriers currently authorized to serve any domestic area are hereby authorized to serve all domestic points.

32. Exchange telephone companies have the potential to increase competition in interexchange, interstate telecommunications services. However, it is possible that an exchange telephone company could utilize unequal interconnection arrangements to gain market power in the interstate services of its affiliate. We will scrutinize exchange interconnection arrangements for discrimination through our examination of exchange access tariffs and our complaint process; by this decision, we do not lessen our regulatory scrutiny of possible abuses of an exchange telephone company's local exchange facilities. We mandated nondiscriminatory access charges adjusted to account for quality differences until equal interconnection is available to all interexchange carriers in *MTS/WATS Market Structure Inquiry: Third Report and Order*,[71] and have instituted a rulemaking to address equal interconnection.[72] We will continue to apply full Title II regulatory scrutiny to exchange access tariffs. To ensure that ratepayers are not harmed, we will consider carefully complaints regarding rates for interstate services charged by affiliates of exchange telephone companies utilizing premium interconnections[73] from those companies.

33. Even if we have erred in our analysis of market power, by classifying these carriers as non-dominant we are not removing fully our regulatory checks on their prices. As we pointed out in the *First Report* when we created the rules for non-dominant carriers, customers of these carriers retain regulatory protection for those few cases in which they may need it.[74] Non-dominant carriers, other than those treated by forbearance, must file tariffs and we retain the right to suspend and investigate tariff filings either on our own initiative or in response to petitions from customers or others. We also can investigate complaints against non-dominant carriers, including complaints regarding their duty to serve.[75] Under Section 208 of the Communications Act of 1934, the Commission can call on a carrier to answer a complaint within a reasonable time. If there

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[71] 48 F.R. 10,319 (1983), *reconsid.*, FCC 83–356 (released Aug. 22, 1983).

[72] MTS/WATS Market Structure, Phase III (CC Docket No. 78–72) (released May 31, 1983).

[73] Premium interconnection arrangements for exchange access are discussed in MTS/WATS Market Structure Inquiry: Third Report and Order (reconsideration), FCC 83–356, at 45–58 (released Aug. 22, 1983).

[74] 85 FCC 2d at 30–40.

[75] *Second Report*, 91 FCC 2d at 65.

appears any reasonable ground for investigating the complaint, the Commission has the duty to investigate and can require the carrier to submit data, including cost justification and the rates and terms for different customers. If a rate is found unlawful, the carrier may be liable for damages under Section 206. The comments of parties in this proceeding have alerted us to potential problem areas regarding attempts by carriers to charge unjust or unreasonable rates. While our analysis leads us to doubt that the carriers covered by this proceeding would charge unlawful rates, we will remain sensitive to these concerns and investigate complaints expeditiously. Also, we would quickly initiate an investigation against rates and practices which appear unjust and unreasonable. However, we do not believe that the limited potential problems warrant imposing a heavy regulatory burden on these carriers with consequent costs and inefficiencies. If necessary, we can re-impose the tariff-filing and facilities-authorization requirements on a class of carriers we find non-dominant in this Order.

34. In addition, we stated in the *Further Notice*, that our requirement that MCCs allow other carriers to interconnect to their networks without paying a charge for retransmission rights creates incentives for inefficiencies and distorts MCCs' pricing.[76] Since MCCs lack market power, they cannot profitably charge unjust or unreasonable rates for interconnecting with their networks, and they cannot profitably impair consumers' welfare by charging for interconnections. Accordingly, we allow MCCs to impose charges on other carriers for retransmission rights. We will treat MCCs by streamlined regulation. Along with market forces, our tariff-review and complaint processes are available to check these charges.

35. We believe that the decision in the *Second Report* to forbear applying particular tariff-filing and facilities-authorization Title II regulation to terrestrial resellers should be extended to cover all resellers, including domsat resellers, resellers owned by or affiliated with an exchange telephone company, and domestic record-carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act. We distinguished resellers from other non-dominant carriers in that resellers do not own their own facilities; the underlying carriers' rates act as a "just and reasonable" ceiling on resellers' rates, and resellers cannot affect the availability to the public of services via underlying facilities.[77] The logic of this approach extends to domsat resellers even though they typically own transmit or transmit/receive earth stations. Such

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[76] 84 FCC 2d at 514.

[77] *Id.* at 69, 71. "[T]he continued imposition of tariff and entry and exit requirements upon carriers without facilities of their own undesirably have the effect of delaying new services and dampening innovation and marketing strategies." *Id.* at 67.

facilities ownership by domsat resellers does not limit the check of domsats' rates on those of domsat resellers. Also, in light of the relatively low cost and short construction time for earth stations, this facilities ownership does not give domsat resellers the ability to make services unavailable. Domsat resellers will not have to file tariffs or Section 214 applications for transmit or transmit/receive earth stations, but will require authorization under Title III for their earth stations. We will treat providers of satellite earth station services by the same regulation as domsat resellers. Carriers owning transponders will be treated as domsats (carriers subject to streamlined regulation) rather than domsat resellers (carriers subject to forbearance). Because of the requirements of the Record Carrier Competition Act and the Commission's interim implementation order,[78] we treat WU and all record carriers covered by the interconnection requirements of that Act under streamlined regulation.

36. We have had three years of experience with treating specialized common carriers as non-dominant. There is no evidence that it is in the public interest for us to continue receiving streamlined tariff and Section 214 filings from certain specialized common carriers to prevent them from charging unjust or unreasonable rates or making service unavailable.[79] We extend forbearance treatment to all carriers subject to streamlined regulation prior to this Order based on their absence of market power and our experience with regulating them as non-dominant carriers. However, since information on their facilities may be useful in the Inquiry into long-run regulation of AT&T (FCC 83–482) and other proceedings, we maintain the filing requirements under Section 63.07 of our rules for all carriers treated by forbearance except resellers. We include GTE SPRINT (formerly Southern Pacific

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[78] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, *supra* note 35. Pursuant to the RCCA, we required that carriers engaging in both domestic and international record communications "set forth in a clear and concise manner the domestic charge for each interconnected domestic carrier, the international charge, and the total end-to-end charge in their public tariffs." 91 FCC 2d at 488. Streamlined regulation of the domestic operations of record carriers does not affect their obligations under the RCCA or the Commission's implementation order.

[79] We have received only five petitions against tariff filings by specialized common carriers since adoption of the streamlined rules. In each case, allegations of unreasonable rates or other terms of service were found to be without merit. MCI Telecommunications Corp., Mimeo No. 07613 (released March 2, 1981); MCI Telecommunications Corp., Mimeo No. 001952 (released July 6, 1981); United States Transmission Systems, Inc., Mimeo No. 508 (released Nov. 13, 1981); Hart Industries, Inc., Mimeo No. 003323 (released Sept. 11, 1981); Southern Pacific Communications Co., Mimeo No. 4029 (released May 9, 1983). There have been only a couple of oppositions to service discontinuances by specialized common carriers during this period. In each case, allegations of harm from the discontinuance were found to be without merit.

Communications Co.) in the class of specialized common carriers subject to forbearance.[80] Our experience with streamlined regulation of this carrier shows no likelihood of regulatory problems from forbearance, and our order in GTE's acquisition of this carrier (FCC 83–269) found no likelihood of lessening competition.

37. We may extend forbearance treatment to other categories of non-dominant carriers in the future after observing the costs and benefits of streamlined regulation of different categories of carriers. Within 18 months after issuance of this Order, we will review our experience and decide whether to continue applying streamlined regulation to carriers we today classify as non-dominant. Also, the Common Carrier Bureau will have the authority to determine whether a particular carrier that would be treated by streamlined regulation qualifies for forbearance treatment. This determination will be made after a carrier's petition when the costs and benefits of forbearance for that carrier are more attractive than those of streamlined regulation. We are confident that market forces, our complaint process, and our ability to re-impose tariff-filing and facilities-authorization requirements are sufficient to protect the public interest regarding carriers treated by forbearance. A carrier may have a mix of characteristics, with some of the streamlined-regulation types and some of the forbearance types. If the carrier has separate affiliates with these different characteristics, one may be subject to streamlined regulation while the other may be treated by forbearance. If a single entity has these mixed characteristics, it will be treated by streamlined regulation unless a waiver is granted. Also, a carrier may have some characteristics not found to be non-dominant. *See, e.g.*, para. 40 *infra*. If the carrier has a separate affiliate with only streamlined-regulation and/or forbearance types of characteristics, that affiliate would be treated as non-dominant and subject to streamlined regulation or forbearance, as specified *supra*. If a single entity has some characteristics not found to be non-dominant, that entity is not eligible for streamlined regulation or forbearance.

38. We discussed our legal authority to regulate differently dominant and non-dominant carriers in the *First Report*.[81] Briefly stated, we believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and

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[80] In view of the fact that GTE has maintained GTE SPRINT as a structurally separated affiliate, which conforms to the terms of the consent decree in United States v. GTE Corp., 5 Trade Reg. Rptr. (CCH) para. 50, 833 (D.D.C. 1983), we are prepared to treat GTE SPRINT as subject to forbearance.

[81] 85 FCC 2d at 12–20, 40–44. "So long as our regulation imposes costs on some firms, and thus on the public, not exceeded by the benefits generated thereby, the provision of communications service by those firms can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs.' *Id.* at 13 (referring to the goals stated in 47 U.S.C. § 151).

burdens for non-dominant carriers. Such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. Consequently, users pay higher rates and there is limited availability of services satisfying users' needs. Generally, the Commission has the duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unnecessary regulatory burdens on carriers.[82] Furthermore, the Commission has broad discretion in choosing how to regulate and can modify its procedures in light of changing market conditions.[83] The Communications Act does not specify the amount or type of information to be obtained from applicants or procedures under Section 214(a).[84] Facility decisions by non-dominant carriers cannot be translated into higher prices and cannot make service unavailable. Efficient application of our Section 214 authority does not require circuit-by-circuit analysis of their facilities; in fact, such analysis would be an unnecessary regulatory burden, impair competition, and be contrary to the public interest. Also, the Commission may use various methods, including some reliance on market forces, to arrive at just and reasonable rates.[85] The combination of our ability to investigate rates of non-dominant carriers in response to complaints or on our own initiative and market forces will ensure that these carriers' rates are just and reasonable.

39. In addition, there is legal support for our treatment of domsats and domsat resellers as non-dominant carriers despite their potential to earn economic rents in times of scarcity through rates

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[82] *See, e.g.*, Geller v. FCC, 610 F.2d 913, 980 (D.C. Cir. 1979); Home Box Office v. FCC, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). *See also* 47 U.S.C. § 222(b)(1) (1983) ("the Commission shall forbear from exercising its authority under this chapter as the development of competition among record carriers reduces the degree of regulation necessary to protect the public").

[83] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); *Computer and Communications Industry Association*, *supra* note 27, 693 F.2d at 212; AT&T v. FCC, 572 F.2d 17, 26 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142, 1157 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ("Regulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.").

[84] ITT World Communications v. FCC, 595 F.2d 897, 900 (2d Cir. 1979).

[85] *Computer and Communications Industry Association*, *supra* note 27, 693 F.2d at 210–11; Western Union Telegraph Co. v. FCC, 674 F.2d 160, 165–66 (2d Cir. 1982). In meeting the statutory standards of just and reasonable rates, it is the result reached and not the method employed which controls. FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1943); FERC v. Pennzoil Products Co., 439 U.S. 508, 516–17 (1979). The Commission's reliance on market forces does not mean lack of regulation. United States v. Western Electric Co., 531 F. Supp. 894, 902 (D.N.J. 1981).

reflecting their opportunity costs rather than historical costs. We have previously stated that "[r]ates developed on some basis other than the cost of providing service may be found lawful if convincingly justified from the standpoint of the Commission's statutory objectives."[86] In at least two cases, the Supreme Court upheld rates in which a regulatory commission did not adhere rigidly to a cost-based determination of rates, much less to one that based each supplier's rates on his own costs.[87] This Commission's decision that, subject to certain conditions, competitive necessity can justify differential rates without cost justification was upheld on appeal.[88] Also upheld on appeal was the Commission's finding that value of service pricing would be lawful if shown to promote the public interest.[89] In 1982, we declined to suspend or reject AT&T's operator-assistance service charges with high markups over purported costs. AT&T justified these charges as discouraging the use of labor-intensive, expensive operator assistance; in allowing the charges to go into effect, we noted that the surcharge did not appear unreasonable on its face.[90] Courts have upheld non-cost additions to regulated rates for scarce products when such policies would promote regulatory policies.[91] We have found herein that allowing the rates of domsats and domsat resellers to equal market-clearing prices will promote the public interest by increasing the availability of innovative, efficient services that make use of potentially scarce satellite resources and efficiently allocating those resources among potential buyers. We can investigate these carriers' rates which do not appear to promote the public interest and, if necessary, prescribe just and reasonable rates.

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[86] RCA American Communications, 89 FCC 2d 1070, 1077 (1982), *citing* American Television Relay, 63 FCC 2d 911, 924–30 (1979), *aff'd in relevant part sub nom.* Las Cruces TV Cable v. FCC, 645 F.2d 1041 (D.C. Cir. 1981), and Permian Basin Area Rate Cases, 390 U.S. 747, 776–77 (1968).

[87] Placid Oil Co. v. FPC, 483 F.2d 880, 890 (5th Cir. 1973), *aff'd sub nom.* Mobil Oil Corp. v. FPC, 417 U.S. 283, 308 (1974) ("non-cost factors are, or may be, a proper element of rate structure if they are clearly labeled and justified on the basis of 'substantial evidence on the record as a whole'"); Permian Basin Area Rate Cases, *supra* note 86, 390 U.S. at 815 (lawful rates included non-cost price elements for future expansion of exploratory efforts).

[88] Telpak Rates, 38 FCC 370 (1964), *aff'd sub nom.* American Trucking Associations v. FCC, 377 F.2d 121, 131 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[89] American Television Relay, *supra* note 86, 63 FCC 2d at 924–30 (incorporation of population factor in rate structure is value of service pricing and would be lawful if clear and convincing showing of public interest justification would be made).

[90] AT&T: Equalization Filing, 89 FCC 2d 1000, 1099 (1982).

[91] *See* cases cited in note 87 *supra*; Consolidated Rail Corp. v. United States, 567 F.2d 64 (D.C. Cir. 1977) (incentive per diem charges on type of boxcar in shortage to encourage railroads to acquire that type of boxcar). In *Hope Natural Gas*, *supra* note 85, 320 U.S. at 629, Justice Jackson in a separate opinion recommended that prices for a scarce resource should be used "functionally to produce a supply that will satisfy a socially selected level of demand, and efficiently to allocate that supply." The courts have allowed regulatory commissions great flexibility in developing regulatory schemes for scarce resources. *See Mobil Oil*, *supra* note 87, 417 U.S. at 331; *Placid Oil*, *supra* note 87, 483 F.2d at 889; *Permian Basin*, *supra* note 86, 390 U.S. at 772.

40. We believe that this Order promotes the public interest in efficient telecommunications services by removing costly regulatory burdens while maintaining adequate assurance of just and reasonable rates and service availability. We are committed to analyzing the costs and benefits of our present regulation. Comments in the Inquiry into regulation of AT&T adopted today may lead us to act soon on AT&T's pending petitions or other pleadings that it may file in this rulemaking for non-dominant treament of some of its services. Also, we will consider streamlined regulation or forbearance from regulating other categories of carriers in response to petitions or on our own initiative. Such petitions should address the relevant product and geographic markets, supported by factual evidence of demand and supply substitutability, and market power, supported by factual evidence of the level and change in market shares and entry. Among the classes of carriers not heretofore considered in this rulemaking are providers of domestic public land mobile radio services, public coast maritime mobile radio services, multipoint distribution services, digital electronic message services, and cellular mobile radio services.[92]

IV. *Ordering Clauses*

41. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j), 201–205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and (j), 201–205 and 403, and section 553 of the Administrative Procedure Act, 5 U.S.C. 553, That the policies set forth herein ARE ADOPTED and effective on the date of publication in the Federal Register.[93]

42. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214, 303 and 308 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 514(i) and (j), 214, 303 and 308, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, that Section 63.07 of the Commission's Rules and Regulations, 47 C.F.R. § 63.07, is amended as set forth in the Appendix.

43. IT IS FURTHER ORDERED, That carriers treated by forbearance as defined in this order are given permission to cancel their tariffs on file with this Commission. Cancellation shall be by supplement effective upon five day's notice and the supplement shall reference this order as authority for cancellation. For this purpose,

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[92] Pursuant to the *First Report,* resellers of these services are treated by forbearance.

[93] The Commission finds that because these policies relieve restrictions on competition and public benefits will be derived from putting them into effect without delay, an immediate effective date is in the public interest. *See* 5 U.S.C. § 553(d).

Sections 61.58, 61.59 and 61.116 of the Rules, 47 C.F.R. §§ 61.58, 61.59 and 61.116, are waived.

44. IT IS FURTHER ORDERED, That petitions for waiver of the twenty-five page limit on petitions for reconsideration and petitions for acceptance of late-filed comments ARE GRANTED.

45. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by American Satellite Company, RCA American Communications, Inc., National Telecommunications and Information Administration, Western Union Telegraph Company, Transponder Corporation of Denver, General Telephone and Electronics Corp., Western Tele-Communications, Inc., ISA Communications Services, Gordon and Healy, Southern Satellite Systems, Andrews Tower Rental, East Texas Transmission Company, Hi-Desert Microwave, Pilot Butte Transmission Company, Inc., RCA Global Communications, U.S. Department of Justice, ITT World Communications, Satellite Business Systems, United States Independent Telephone Association, and United Video, Inc., ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

46. IT IS FURTHER ORDERED, That the Secretary shall cause this Fourth Report and Order to be Published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 63 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Sections 63.07(a)(5) is amended by replacing the words "continental United States" with "all domestic points."

2. Section 63.07(c) is deleted, and Sections 63.07(d) and (e) are relabeled as Sections 63.07(c) and (d), respectively.

Common Carrier, Computer Inquiry
Common Carrier, Data Processing Service, Protocols
Common Carrier, Interconnection
Common Carrier, Specialized Services

Memorandum Opinion, Order, and Statement of Principles adopted regarding communications protocols under Section 64.702 of Commission's Rules and Regulations. The proceeding is an outgrowth of Second Computer Inquiry, 77 FCC 2d 384 (1979).
–Communication Protocols
GEN Docket No. 80–756

FCC 83–510

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Communications Protocols under Section 64.702 of the Commission's Rules and Regulations | Gen. Docket No. 80–756

MEMORANDUM OPINION, ORDER, AND STATEMENT OF PRINCIPLES

(Adopted: November 8, 1983; Released: November 21, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

A. *Introduction*:

1. This proceeding is an outgrowth of the *Second Computer Inquiry* (hereafter, "Computer II"), 77 FCC2d 384 (1979) (*Final Decision*), *aff'd on reconsideration*, 84 FCC2d 50 (1980) ("Reconsideration Decision"), 88 FCC2d 512 (1981), *aff'd sub nom.*, *C.C.I.A.* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.*, *Louisiana* v. *United States*, 103 S.Ct. 2109 (1983). In *Computer II*, we established a dichotomy between basic communications services which are the subject of regulation under Title II of the Communications Act of 1934 as amended, and enhanced services which are not subject to such regulation. Section 64.702(a) of our rules defines "enhanced services" as:

> services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

Such services are not regulated under Title II of the Act.

2. The definition of enhanced services is fundamentally predicated on the concept that a basic service is an offering of transmission capacity between two or more points suitable for a user's transmission needs, and subject only to the technical parameters of fidelity or distortion; in offering a basic transmission service, a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information. *Final Decision*, 77 FCC2d at 420.[1] An enhanced service does more than this. It alters the subscriber's information or electrical signals, or it involves subscriber interaction with stored information. *Id.*, 420–21.

3. When we adopted the *Computer II* dichotomy, we acknowledged that the enhanced services definition would include not only the type of information alteration which is generally thought of as processing of data, but also alterations of subscribers' transmitted electrical signals. In essence, there is a continuum of possible transmission capabilities which encompasses transmission with no changes in these electrical signals (clearly, a basic service offering) and transmission involving creation, deletion and alteration of information (clearly, a service traditionally thought of as "data processing", and within the enhanced service definition). Changes of a less clear nature involve changes to control information, including code and protocol changes (the focus of this proceeding), which facilitate transmission. Since the record before us in *Computer II* supported treating code and protocol conversion alike with forms of processing which more clearly might be thought of as information processing, we adopted the present rule. However, in view of the structural and facilities separation conditions on the American Telephone and Telegraph Company (AT&T), which would foreclose provision by AT&T of code and protocol conversion in its common carrier facilities,[2] we commenced this proceeding to consider whether, and to what extent, code and protocol processing might be treated specially. By *Notice of Inquiry* herein (hereafter, "Notice"), 83 FCC2d 319 (1980), we sought comment on whether carriers subject to structural separation of basic and enhanced offerings and related facilities should be permitted to associate code and protocol conversion capabilities with facilities used to support the offering of basic service. A major issue related to packet-switched transmission,

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[1] *See also*, Satellite Business Systems, 62 FCC2d 997, 1052 (1977), *aff'd sub nom.*, United States v. FCC, 652 F.2d 72 (D.C.Cir. 1979) (en banc) (discussion of "transparency").

[2] Any such operations which are performed wholly within communications facilities, but which are not manifested at the outputs, are not within this treatment. *See*, 77 FCC2d at 421–22; 84 FCC2d at 57–60.

where there has been international standardization of two forms of transmission protocols: a protocol for

4. By *Notice of Inquiry* herein (hereafter, "Notice"), 83 FCC2d 319 (1980), we sought comment on whether carriers subject to structural separation of basic and enhanced offerings and related facilities should be permitted to associate code and protocol conversion capabilities with facilities used to support the offering of basic service. A major issue related to packet-switched transmission, where there has been international standardization of two forms of transmission protocols: a protocol for communication between a packet-switched network and a subscriber, and a different protocol for communication between (and among) packet-switched networks if they are interconnected. Provision of both interfaces simultaneously by a carrier intrinsically would involve protocol conversion by the carrier, and therefore provision of enhanced service under the *Computer II* rules, yet restriction of a carrier's ability to do so could frustrate the availability of efficient interconnected service. We suggested that it might be possible to establish a limited class of code and protocol conversions which could be provided by AT&T on a commingled basis (i.e., notwithstanding the structural separation otherwise imposed on AT&T), but that if such treatment were adopted enhanced service providers might also be permitted to offer such capabilities without thereby subjecting their offerings to regulation under Title II of the Act. Consistent with this suggestion, we sought comment on an appropriate definitional structure for defining a limited class of code and protocol conversions which might be eligible for this treatment. Also, we noted that one form of protocol conversion, between the protocols used in two types of terminals employed by the hearing-impaired (i.e., between the older Baudot-Weitbrecht teletype-like protocol and the more current ASCII protocol employed in computer terminals and TWX teletypewriters), might be a desirable adjunct to basic service, and we requested comment on this issue.

5. The comments received in this proceeding convince us that a change in the definition of enhanced service is unwarranted, that any inefficiencies which may flow from the application of these rules to carriers subject to structural separation are at this point minimal and are more than counterbalanced by the benefits of unregulated supply of enhanced services and marketplace certainty in maintaining the existing definition. However, upon review of the records of this proceeding and of *Computer II*, we conclude that the provisions of Section 64.702(a) should be applied in a flexible manner so as to ensure that the transitional introduction of new technology in basic services is not inhibited. Furthermore, we seek to clarify in this order that while the term "protocol" processing may have a rather broad reach if applied literally, because the term "protocol" has evolved broadly in the contemplation of international standards

such as the protocol classification scheme of the International Standards Organization (the Open Systems Interconnection model, usually referred to as the ISO/OSI model) and others, our use of this term in the definition of enhanced service is more narrow. Finally, while we conclude herein that the present definition of enhanced service should not be changed generally, we adopt principles under which special treatment of particular services and carriers' offerings might be addressed *ad hoc*, and the showings that must be made in any such circumstances which may arise.

B. *The Notice of Inquiry*:

6. The issues, comments, and replies are summarized in Appendix A to this decision, and we have carefully considered them in reaching our results herein. For purposes of discussion, we briefly describe the major points made.

7. First, a number of comments and replies misconstrued the purpose of this proceeding as seeking either to reexamine the fundamental definitional and structural separation structure established in *Computer II*, or as seeking to expand the reach of regulation of code and protocol processing if such functions were, as an outgrowth of this proceeding, to be included within the basic service classification. Based upon these misconceptions of the purpose or scope of this proceeding, comments were filed which argued strenuously against either result.

8. Second, there was disagreement concerning appropriate definitions and classifications of protocols and protocol conversions. In the *Final Decision*, we broadly defined the concept of "protocols", 77 FCC2d at 420, n. 33, and our discussion in the *Notice* focused on changes which might be performed electrically in networks (conversion) of subscriber-originated protocols under that broad definition. In the *Notice*, we sought comment on whether there might be a basis for further refinement of the treatment of some, but not all, forms of protocol conversion. In that context, we referred to the Open Systems Interconnection analytic model of the International Standards Organization (the "ISO/OSI" model) as an existing basis for classifying and distinguishing various types of protocols[3] and we requested comment on alternatives[4]. Strong argument was made that the existing treatment in the rule of all protocol conversion as an element of enhanced service is proper, and that it should not be changed. Furthermore, it was argued that while the ISO/OSI model

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[3] See n. 6 *supra*. for a listing of the seven layer protocol classification established in the ISO/OSI model.

[4] In its comments during the course of the Computer II proceedings, AT&T had sought the result that basic service be permitted to include protocol processing on the first four levels of the ISO/OSI model. AT&T's request formed the basis for our request for comment on whether it might be appropriate to rely on this model as a basis for distinguishing various forms of protocols and protocol processing.

is useful as a reference for technical analysis, it is somewhat ambiguous and subject to interpretation, and therefore improperly imprecise as a decisional standard for rules. It was noted that the ISO/OSI model is "fluid", that it is subject to change in language or in interpretation by its sponsor, the International Standards Organization, and that the model is neither uniformly accepted nor used by industry. In sum, there was substantial agreement that this model should not be employed to establish classifications of protocols in refining the treatment of protocol processing under Computer II.[5]

9. Third, AT&T argued that a flexible approach is desirable to promote communications efficiency, particularly with respect to what AT&T termed "control signals", i.e., protocols which control the operation of telecommunications facilities.[6] AT&T also argued in favor of an approach which would permit protocol conversion to be performed to support interconnection of high-speed specialized networks, *e.g.*, conversion to X.75 of packet-switched service to support efficient interconnection and interworking of networks otherwise utilizing the X.25 protocol for subscriber interfaces (see para. 19 below). This approach would appear to go beyond its "control signals" proposals. Both of these proposals were contested in the comments.

10. Fourth, providers of data processing and other enhanced services, while concerned that the fundamental dichotomy between basic and enhanced offerings established in *Computer II* might be eroded if protocol processing were permitted to be associated with basic service, were also concerned that underlying transparent transmission offerings remain available if such association were permitted. They strenuously urged that the efficiency of their operations not be *limited* by inclusion by carriers of protocol processing functions which these providers may not wish, or which they might seek to provide themselves in conjunction with carriers' transmission channels. If transparent channels unencumbered by

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[5] It might be noted that in its comments in this proceeding, the initial sponsor of this approach, AT&T, abandoned its earlier advocacy in favor of use of the model, and argued in favor of a treatment of protocol processing which is not specifically addressed in the ISO/OSI model.

[6] AT&T claimed that certain such "control" functions are performed today as part of basic service although they might be thought of as within a broad conceptual definition of "protocol conversion", and that it is clear that we did not intend that such functions be restricted as a consequence of Computer II. Examples of this include tone-to-rotary dialing conversion and automatic identified inward and outward dialing arrangements for PBXs. Such operations might be thought of as within the literal scope of "processing applications which act on the . . . protocol or similar aspects of the subscriber's transmitted information", Section 64.702(a) of the rules. (We excluded from the definition of enhanced services operations which are intrinsic to the offering of basic services, else basic services could not be offerred. *See*, Final Decision, 77 FCC2d at 419–20. In its comments, AT&T sought to generalize its concept of "control" functions broadly to encompass error correction, flow control, billing and routing information.)

protocol processing do not remain available, it is said, unnecessary costs associated with the inclusion of protocol processing functions might be imposed, and flexibility and efficiency might be denied the providers of data processing and other enhanced services, and their customers.

11. Fifth, considerable comment was received on our specific request for information concerning protocol conversion functions which might necessarily be inherent in the ability efficiently to connect packet-switched networks with one another.[7] As was pointed out in comments[8], if one such network is basic (i.e., produces at the output(s) unchanged information received at the input) protocol conversion issues are not raised in connection with that network; no protocol conversion is involved in such transparent transmission. And, if both such networks are enhanced, any protocol conversion function desired may be included by the vendors of such unregulated offerings. However, we were concerned with a related issue, specifically the issue of whether an otherwise basic packet-switched network should, specially for internetwork interconnection, be permitted to generate an output to another network in a different protocol than its normal user inputs and outputs, with its associated intra-network (or an alternative inter-networking protocol) intact—notwithstanding that such intermediate protocols are not part of the subscriber's transmitted information—to avoid inefficient double protocol conversion. Without this capability, there might be time delays in moving data across the network boundary, added costs, and preclusion of some types of transmission. Firms offering enhanced services which include protocol conversion capabilities were concerned with competitive ramifications of any approach which would permit AT&T to commingle protocol processing with its basic facilities. These firms argued that it is unnecessary to permit commingling of protocol conversion capabilities with the facilities that support the provision of basic services, that protocol processing capabilities are and will remain available from a variety of sources (other than the provider of the underlying basic services) if the existing constraints are maintained, and that to permit any such commingling would be more detrimental to the overall goals of *Computer II* than any benefits which might thereby be achieved.

12. And finally, the Department of Defense, as executive agent for the National Communications System[9] and for its own interests

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[7] An issue raised by the comments was whether carriers subject to structural separation are permitted to offer packet-switched services. This question was resolved in the context of our grant of authority under Section 214 of the Act to AT&T to offer Basic Packet Switched Service. *See*, AT&T (BPSS), 94 FCC2d 48, FCC 83-221, released May 26, 1983.

[8] *E.g.*, comments of ADAPSO.

[9] The National Communications System, or "NCS", is a confederation of the federal government's telecommunications resources, as a user.

as a user, argued that it is to the advantage of users for basic services to include all forms of code and protocol conversion, to allow a single service vendor to assume end-to-end responsibility.

C. *Discussion*:

13. As noted, upon review of the comments received in this proceeding and of pertinent comments filed during the course of *Computer II*, we conclude that a change is not warranted in the *Computer II* rules which address protocol processing. In this section we address those limited circumstances where clarification of the *Computer II* rules is desirable, and where flexibility may be desirable.

1. *Network Processing*

14. In the *Final Decision*, we defined "protocols" as follows:

> Protocols govern the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages.

77 FCC2d at 420, n. 33. The definition of enhanced service includes, *inter alia*, "processing applications that act on the . . . protocol of the subscriber's transmitted information." On reconsideration, we clarified that the definition of enhanced service does not reach protocol conversions which are performed internally to a carrier's network, and not manifested at the outputs of the network in end-to-end transmission, 84 FCC2d at 60–61. However, there are forms of processing within such networks which might be thought of as "processing" or "conversions" of protocols within the meaning of the definition of enhanced service, although they are not within the intent of the definition. For example, when the pulses or tones corresponding to an MTS dialed number are used to route a call through the network, they are often changed in a variety of ways. The electrical signals (pulses or tones) corresponding to the dialed number might be thought of as part of the "subscriber's transmitted information." These signals, which represent the dialed number, are not explicitly transmitted to the dialed party when an MTS call is made.[10] Obviously, we did not intend to classify this form of action on subscribers' transmitted dialing (routing) information as enhanced as we stated that processing in the nature of "functions necessary to route a message throught the network", 77 FCC2d at 418, may properly be associated with basic service. Similar examples of a potential but unintended reach of the literal rule were provided in connection with AT&T's "control signals" proposal, (*e.g.*, tone-to-

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[10] When a ringing telephone is answered, the tone or pulse signals are not normally transmitted to the called party.

pulse dialing signal conversions, and automatic identified dialing arrangements for PBXs), n. 6 above.

15. To reiterate the concept established in the *Final Decision*, a basic switched service may properly include those forms of protocol processing which are necessary for a switched service to be offered. Specifically, the network may accept and utilize premises equipment-generated signals which alert the network that the terminal is ready to generate or to receive a call (i.e., off hook-type signals), signals which tell the network the destination of the call (i.e., dialing-type signals), and signals which alert the network that a call has ended (i.e., on hook-type signals). This principle applies to entire calls made on a switched network (e.g., to MTS and WATS calls in telephony and to TWX and telex calls in telegraphy), and to individual messages which are, in essence, individual calls themselves (e.g., to packets in a packet-switched network). It should be emphasized that these network functions which are intrinsic to the provision of switched services do not involve the creation, deletion, or modification of message information, nor subscriber interaction with stored information. They may properly be associated with basic service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act.

2. *Transitional Introduction of Technology*

16. A second area warranting discussion concerns the introduction of new technology in basic service. Oftentimes, such technology is introduced piecemeal, and appropriate conversion equipment is used within the network to maintain compatibility. For example, digital transmission technology has for some time been used within the telephone network to support voice transmission, but the network interfaces to subscriber equipment have continued to be analog. Requisite analog-to-digital and digital-to-analog conversion equipment has been used within the network, but the internal digital signals have not been manifested at subscribers' loop interfaces. However, there is currently a trend towards the use of digital loops which will interface with customer premises equipment using a digital protocol interface. A potential problem might arise if a call were placed between a user of equipment which employs such a digital interface and a user using the more traditional analog interface (with appropriate conversion equipment employed within the network): there would be a net protocol conversion within the network for such a call to proceed, i.e., from a digital to an analog protocol between the ends of that call. This could be thought of as invoking the definition of enhanced service, although the service itself would remain a switched message service otherwise unchanged except for the characteristics of the electrical interface.

17. We believe it important to ensure that this potential result

does not create disincentives for introduction of new technology. Accordingly, in circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology, we are prepared to act favorably and expeditiously on petitions for waiver of the *Computer II* rules to ensure that new technology to implement an existing service can and will be employed.

3. Other Forms of Protocol Conversion

18. Appropriate treatment of other forms of protocol conversion which carriers might seek to associate with basic service is less clear. In the *Notice*, we proposed to retain our *Computer II* treatment of protocol conversion as an enhanced service, but we raised the possibility that limitations on protocol conversion in the specific case of conversion to another protocol to facilitate interconnection of networks (*e.g.*, a conversion from X.25 to X.75 to facilitate interconnection of packet-switched networks) could result in undue inefficiency.[11] In light of this, we sought comment on whether protocol conversion to support interconnection between (and among) networks might be treated specially. A number of comments argue that any such conversions can be performed outside of carriers' basic service networks by unregulated service vendors offering a conversion service. As noted, conversions such as these are permitted internally in individual carriers' basic networks, but it is unclear whether in a multiple carrier (or combination of carrier and enhanced service vendor) service arrangement conversions such as these may be included in any common carrier basic network which may be involved, with the end result that there is no net protocol change between the ends of the basic common carrier service involved.

19. In a packet-switched network, subscribers' information is collected into individual bursts (or "packets") of information, to which routing information is attached at the source. The network utilizes the routing information on a packet by packet basis to route

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[11] In the Notice, we suggested the possibility of treating link level (corresponding to the "link layer" of the ISO/OSI model) and other "low level" protocol conversions as inherent in basic service functions. These included modification of packet sizes in packet-switched networks. The last might be important to optimization of network utilization, but would imply a high level of processing by the network.

An additional specific conversion discussed was Baudot/Weitbrecht to ASCII/103 conversion, principally to support communications between equipments widely used by the hearing-impaired community. At this time, such a service is not being proposed to be offered as a common carrier service. Issues of possible exceptions to Computer II to implement provisions of the Telecommunications for the Disabled Act of 1982, P.L. 97–410, which include communications by the hearing-impaired, are being addressed in pending proceedings in C.C. Docket No. 83–427, Notice of Proposed Rulemaking, 93 FCC2d 1311, FCC 83–176, released May 14, 1983. Accordingly, we shall not address the Baudot/Weitbrecht to ASCII/103 conversion issues further in this proceeding.

the packets to the chosen destination. This allows packets to take different routes through the network. Delays and other operational difficulties may be encountered when two packet-switched networks are interconnected. For the X.25 protocol, packets may have to be resequenced at the point of interconnection, adding to overall transmission delay. One approach to avoiding this is use of a special interworking protocol, X.75, that has been recommended as a standard by the CCITT to facilitate the efficient interconnection of X.25 packet-switched networks. However, if an otherwise basic packet-switched network, receiving subscribers' signals under the standard X.25 subscriber interface protocol, were to use the X.75 protocol for an interworking interface with another network, there would be net protocol conversion of the subscribers' transmitted information (i.e., from the X.25 protocol to the X.75 protocol). This would be an enhanced service under Section 64.702(a). Conversion equipment outside of a carrier's network would appear incapable of avoiding these ineffiencies.

20. Although we are concerned about this potential inefficency, we shall not adopt general rules to address it. We have some appreciation for the potential X.25 and X.75 problem in the context of the current international recommendations defining these interfaces, and current packet-switching services. But, the foregoing may change over time in ways which may not be presently foreseeable,[12] and any general rule we were to adopt at this juncture might prove inadequate. Rather, as was urged by several parties in their comments in this proceeding, we shall address any such problems *ad hoc* through the waiver procedure outlined in our *Reconsideration Order*, 84 FCC2d at 57. In this way, we will be able to assess the issues raised by a specific proposal to employ protocol conversions in connection with basic service in a narrow manner, with full appreciation of the circumstances and ramifications involved in any such proposal.

21. AT&T has cautioned, however, that a waiver procedure could introduce uncertainties and possible inconsistencies which might hinder technological planning. We believe that this is a matter largely within the control of the carriers, which can seek waivers from the Commission at any stage of the planning process. In any

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[12] The FCC has strengthened its participation in CCITT deliberations during the past two years in part to monitor the treatment of issues such as these which evolve internationally. Also, we recently initiated an inquiry into the public interest ramifications of the evolving Integrated Digital Services Network recommendations of the CCITT, Notice of Inquiry, Gen. Docket No. 83–841, 94 FCC2d ___ , FCC 83–373, released Aug. 10, 1983. Based in part on the positive responses received in this proceeding to issue 3 (see Appendix), we have requested comment on an appropriate FCC role in the development of international ISDN recommendations. But, the point remains that the international recommendations may change in material respects, beyond the control or contemplation of the FCC.

event, an *ad hoc* approach allows for a fuller examination of the particular circumstances of a particular proposal. Our underlying premise is that the *Computer II* rules themselves create certainty, and that any waiver of these rules should properly be treated exceptionally. However, to minimize any uncertainty of an *ad hoc* decisional process, we shall identify below the principles which we shall apply to requests to associate protocol processing with basic service by a carrier which is subject to structural separation. We conclude that, with the guidance which will be provided through adoption of such principles, AT&T's concerns in this regard will be met. Furthermore, to ensure that such a waiver process does not introduce delay, under normal circumstances we are prepared to address waiver requests within sixty days. Accordingly, based upon the comments herein, and in *Computer II*, we are establishing the following general principles under which any such waiver request will be analyzed.

22. First, a waiver request to permit association with basic service of protocol conversion to an intermediate internetworking protocol (*e.g.*, similar in principle to conversion to X.75 for network-to-network interconnection of packet-switched networks otherwise operating on the X.25 protocol) will be treated more favorably than other waiver requests seeking broader association of protocol conversion with basic service. A narrow waiver of this nature would tend to have a *de minimis* impact on the policies of *Computer II*, both in terms of the magnitude of protocol processing which might be involved and the number of entities which might be affected. However, we will carefully analyze whether any common carrier offering which might be permitted to have such protocol processing associated with it is indeed a truly general offering, to ensure that it is not specially (and in any sense anticompetitively) tailored to the carrier's own unregulated operations.[13]

23. This first principle may have particular applicability in the context of international services. While networks in individual countries may operate using domestic protocols (interface specifications), interconnection of national networks with one another to facilitate international transmission requires that, at the point of interconnection, common interface specifications be employed. Thus, there often is a requirement for conversion from the protocols employed nationally to protocols employed by another nation's network. Or, there may be an international interconnection protocol (in essence, a "common language" for international service) to which protocols in national networks are converted for international

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[13] Thus, under this principle we would treat more favorably association of protocol conversion capabilities to support interconnection of a basic network with other networks (enhanced or basic), than protocol conversion to support communications among disparate user terminals. The latter would probably not properly be characterizable as having *de minimis* impact on the goals of Computer II.

communications to proceed. In both cases, each national network may utilize one set of protocols for domestic communications, but there will be a conversion to another set of protocols at the point (or points) that communications is transferred from the national network for international communications.

24. Second, there is much merit in an underlying concern of various parties, expressed during *Computer II*, that if a carrier associates protocol conversion with its basic facilities others may therefore be limited in their ability to use such facilities. The carrier's protocol conversion may not be tailored efficiently to a given user's needs, or other service vendors might be able to perform such conversion more efficiently than the carrier. To ensure that any such protocol conversion which might be permitted to be associated with basic service does not become a limitation on others' efficiency, we will require that if any waiver is to be granted, it be granted solely on condition that underlying transparent transmission facilities, which are comparable in price, quality and conditions of service to that built into the offering to be associated with protocol processing, remain available generally and unencumbered by protocol conversion.[14]

25. Third, we will focus with particularity on specific proposals to ensure that what is being proposed is mere protocol conversion alone, and not processing which creates, deletes or changes information itself, nor processing involving subscriber interaction with stored information. We are prepared to address *ad hoc* specific requests for waiver of *Computer II* solely in behalf of services defined as enhanced under the first major clause of Section 64.702(a) of our rules; we are not prepared to permit this to become a vehicle for erosion of the demarcation between enhanced and basic service in overall principle, and specifically within the second and third major clauses of Section 64.702(a) of the rules.

26. And fourth, we are prepared to act more favorably on requests for waiver in circumstances where the performance of the basic network can be improved materially only by provision of

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[14] There are additional reasons for the requirement that underlying basic services remain available unencumbered by protocol processing. First, basic services are those which are available generally to a broad class of customers, and which provide subscriber interfaces and services which are of broad utility. To achieve this objective, it is desirable that basic services conform to recognized standards (e.g., X.25 for packet-switched services) to which diverse equipment manufacturers may design products, so that subscribers have a range of equipment choices available to them to optimize their uses of basic services. A carrier's protocol processing might be "custom", and in the absence of a requirement that the general offering remain available, products of only those manufacturers which happen to manufacture a product tailored to the "custom" interface might improperly be promoted. Second, any necessary regulation of the underlying basic offering would be facilitated by ensuring that it is priced separately from any optional protocol processing which might be permitted.

protocol processing in the network, and not where others can do so outside the network.[15]

D. *Summary and Conclusions*:

27. In sum, we conclude that the result of *Computer II* need not be changed. Experience gained since the *Computer II* decisions has demonstrated that the definition of enhanced service draws an appropriate line between enhanced and basic service, and the comments in this proceeding do not convince us otherwise, except in those circumstances which might be eligible for treatment *ad hoc* on a waiver basis under the principles outlined previously.

28. Clarification is warranted that protocol processing involved in the initiation, routing and termination of calls (or subelements of calls, e.g., packets) is inherent in switched transmision and is not within the definition of enhanced service, and we have done so herein. *See*, para. 15, *supra*. Such protocol processing or conversion may be associated either with basic or enhanced service without affecting the classification of such service under Section 64.702(a) of our rules.

29. A literal application of the definition of enhanced service could have the effect of limiting the ability of carriers to introduce new technology in existing basic services during a transitional period when a new protocol is employed on some lines, but not others, and calls are desired to be made between both types of lines. We have resolved to treat such circumstances expeditiously in the context of an appropriate request for waiver of the *Computer II* requirements.

30. And finally, other protocol conversion issues will be addressed *ad hoc* in the context of requests for waiver. In this decision, we have adopted principles under which any such request will be treated. Such requests will be placed on public notice and interested parties will be given an opportunity to comment specifically on such requests. In this manner, we shall ensure that our underlying *Computer II* policies are not eroded through the long term effects of adopting rules of general applicability, but rather that special treatment of particular circumstances, if granted, is adopted in a manner which preserves these policies.

31. Accordingly, in view of the foregoing, IT IS HEREBY ORDERED, That pursuant to Sections 1, 4(i), 4(j) and 403 of the Communications Act of 1934 as amended, THIS PROCEEDING IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[15] The X.25 to X.75 conversion to facilitate interconnection of packet-switched networks, addressed previously, appears to be such a circumstance, while protocol conversion to facilitate communication among large numbers of users' disparate terminals would appear not to be such a circumstance.

APPENDIX A: SUMMARY OF COMMENTS

1. In the *Final Decision*, 77 FCC2d at 420–22, we described the inclusion of code and protocol conversion in the definition of enhanced service, and noted that comments then before us had not "address[ed] protocol conversion in any depth" nor whether "some flexibility should be afforded a basic service provider that is subject to the separation requirement, in view of the structure." *Id.*, 422 at n. 37. Comments filed in the course of reconsideration of the *Final Decision* thereafter discussed protocol conversion issues, and several comments argued in favor of a more flexible approach, particularly in the context of packet-switched services, while others argued in favor of maintenance of the enhanced services definition unchanged.

2. In the *Notice*, we summarized these views and sought comment generally on the public interest and efficiency ramifications of the adopted rule, as it applies to code and protocol processing. Our interest was in the potential effects on telecommunications users, on telecommunications services and their providers, and on data (and other enhanced) services and their providers, with respect to existing and reasonably foreseeable future service offerings. Comment was invited on six major code and protocol processing issues:

(1) Under what circumstances would the Final Decision inhibit efficient interconnection of packet-switched networks? If so, what would be the minimum degree of protocol conversion which might be permitted to allow efficient interconnection? Should carriers subject to structural separation be permitted to perform such conversion?

(2) Is the ISO/OSI model appropriate for classifying different levels of protocols? If so, is it appropriate to allow carriers subject to structural separation to utilize different "physical layer" protocols at the input and output of a connection? Is it appropriate to allow such carriers to perform "data link layer" protocol conversions?[1]

(3) To date the FCC has had a limited role in the formulation or recommendation of CCITT protocol standards such as X.25.[2] Should the Commission take a more active role in this area? If so, what should this role be?

(4) Should carriers subject to structural separation be permitted to offer the packet size modification features of the X.25 protocol standard?

(5) Should carriers subject to structural separation be permitted to offer protocol conversion capabilities within their networks for conversion of signals from Baudot/Weitbrecht terminals and ASCII/103 terminals?[3]

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[1] The Open Systems Interconnection ("OSI") model of the International Standard Organization ("ISO") hierarchically classifies protocols at seven layers or levels as follows: (1) physical; (2) link; (3) network; (4) transport (end-to-end); (5) session; (6) presentation; and (7) process. *See*, Zimmerman, "OSI Reference Model—the ISO Model of Architecture for Open Systems Interconnection", IEEE Trans'ns on Comm'ns, Vol. COM-28 No. 4, 425–32 (April, 1980), cited in the Notice, 83 FCC2d at 320.

[2] The CCITT is a suborgan of the International Telecommunications Union. Among its activities is the adoption of recommended standards governing telecommunications facilities and services to facilitate the international interworking of service among carriers. X.25 is one such standard, governing subscriber interfaces with packet-switched service.

[3] The Baudot and ASCII codes originally were codes for transmission of teletypewriter-originated data, although they may be used for other purposes as well. The Baudot code is the original teletypewriter code, and is used generally for transmission of international (and domestic) telex messages, and by the hearing-

(6) What are the dynamic incentive effects on carriers subject to structural separation and on competitors of maintaining the present treatment of code and protocol conversion, or of changing such treatment?

3. In addition, the Notice invited submission of information not directly responsive to these questions, but relevant to the general subject matter of this inquiry. Pursuant to this less focused solicitation, comments were filed on a number of other issues:

(7) Should carriers subject to structural separation be permitted to offer packet-switched services? If so, under what restrictions, if any, might they do so?[4]

(8) Should the waiver procedure described in the *Reconsideration Order*, 84 FCC2d at 57, be employed to resolve, *ad hoc*, specific code and protocol conversion issues as they may arise, rather than general rules?

(9) What type of conversions relating to compatibility of terminals should be permitted to be associated with basic services?

(10) What are appropriate definitions of "protocols" and of "conversion" for the purposes of this proceeding?

We briefly summarize the comments filed on the foregoing issues below.

Issue 1

4. In its comments, AT&T agrees with the Commission's observation that the internode device (or "gateway") is the only technically sound approach to internetwork connection because different protocols will likely be employed within different networks to improve their efficiency. To promote intranetwork efficiency, a special transmission protocol for connection of one network with another network may be desirable, although such an internetworking protocol will differ from that employed for end users' connections to each of the involved networks. AT&T argues that there should be a distinction made between subscriber information (within the meaning of Section 64.702(a)) and "control signals" (error correction, flow control, billing and routing information) in treating protocol conversion. When a basic network is interconnected with another network, in AT&T's view the basic network should be permitted to convert such "control signals" from one protocol to another. AT&T also states that it is important to have a high-speed specialized protocol for interconnection of networks, such as the X. 75 standard for connection of packet-switched networks, and that any protocol conversion necessary to conform to such protocol standards should be permitted.

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impaired community. The ASCII code has more features than the older Baudot code, and is used for domestic (and Canadian) TWX messages and for many data processing applications. *See, e.g.*, Interconnection Arrangements Between and Among Domestic and International Record Carriers: Store-and-Forward and TWX/Telex Conversion, FCC 83–85, 93 FCC2d 159, 48 Fed. Reg. 12372 (Mar. 24, 1983). A code conversion between these codes is one form of protocol conversion.

[4] This question has been resolved in the context of our grant of authority under Section 214 to AT&T to offer Basic Packet Switched Service. AT&T (BPSS), 94 FCC2d 48, FCC 83–221, released May 26, 1983. This authorization provides for the installation and operation of appropriate equipment to support the provision of packet-switched service as a basic service within the meaning of Computer II. Under the granted certificate of convenience and necessity, service is limited to those subscriber interfaces described in the AT&T Technical Publication PUB4010 which was attached to the application. We determined that since all subscribers would use the same protocol, as described in the application, protocol conversion would not be performed as part of BPSS. Any changes in signals necessary for the routing of packets (e.g., address interpretation, error control, etc.) are internal to the network, and are therefore permissible.

5. As executive agency for the National Communications System and for its own consumer interests, the Department of Defense (DOD) argues that it is to users' advantage to have basic services include code and protocol conversion, to allow a single vendor to maintain end-to-end responsibility. In DOD's view, higher costs and operational problems will result if a user subscribes to a basic service which does not provide protocol conversion.

6. The National Telecommunications and Information of the Department of Commerce (NTIA) agrees with AT&T's position that conversion of "control" information would allow interconnection of packet-switched networks, while leaving unchanged subscriber information, because interconnected networks must exchange information about their internal status to facilitate transfer of subscriber information. Interconnection of an X.25-based AT&T packet-switched network with another X.25 network via the X.75 internetworking protocol would, in NTIA's view, require protocol conversion within the AT&T network, and this should be permitted because the signals which must be converted are not subscriber information.

7. Southern Pacific Communications Company (SPCC), United States Telephone (UST) and GTE/Telenet argue that any necessary protocol conversions can be provided through facilities external to basic networks. UST notes that since AT&T's network is the only one which is prohibited from providing protocol conversion, any network interconnection will necessarily involve at least one "enhanced" service provider (i.e., the other network involved) which could provide any needed protocol conversion. GTE/Telenet agrees with this position, and notes further that the enhanced services involved will ordinarily have multiple protocol conversion capabilities inherently, which can be used for any necessary internetworking protocol conversion. Tymnet, Inc. argues that it is concerned that if protocol conversion is permitted to be associated with basic services, additional costs will be incurred by subscribers unnecessarily.

8. The Association of Data Processing Service Organizations (ADAPSO) generally agrees with the positions of SPCC, UST and GTE/Telenet, and it argues further that interconnection of networks presents technical difficulties only when the networks involved are not transparent and operate internally according to different protocols. ADAPSO notes that while the *Notice* raises a potential efficiency problem when packets are fragmented into smaller segments for transmission and reassembled in every gateway, alternatives involving common hosts outside the packet-switched networks can avoid such inefficiencies, and that such common hosts can be provided by enhanced service vendors or others outside communications networks. ADAPSO exemplifies this approach by the PUP architecture developed by the Xerox Corporation. And, even if some delay is inherent in this approach, ADAPSO argues that it does not necessarily follow that a common host would be inefficient in all applications. According to ADAPSO, mailbox or database management applications would not suffer from the delays which are attributed in the *Notice* to such an approach.

9. ADAPSO notes further that a disadvantage of a gateway approach is that it would be difficult to select a universal internetworking protocol which would be efficient for all applications. A gateway would be required to perform two conversions: one from the first network's protocol to an internetworking protocol, and a second from the internetworking protocol to the second network's protocol. Conversely, the common host approach involves only one such protocol conversion, from that of the first network to that of the second network directly. Thus, in ADAPSO's view, the gateway and common host approaches are not synonomous.

10. In response to CBEMA (see below), ADAPSO argues that AT&T was not permitted in the *Final Decision* to offer X.25-based packet-switched services; rather, AT&T was only permitted to utilize packet-switching technology within its networks in a manner which remains transparent to subscribers to basic services. In this context, ADAPSO agrees with CBEMA that AT&T should be permitted to "hand off"

(transfer) to another carrier (or presumably, to an enhanced service vendor) messages in its internal intranetwork protocol. ADAPSO argues that, "If AT&T wishes to interconnect two of its own basic packet switched networks, or to interconnect its network with another carrier's network to provide basic service on a joint or 'through' basis, nothing should prohibit any number of intra- or inter-network protocol conversions by the two carriers. In other words, AT&T should be able to 'hand off' a message to a second carrier in AT&T's internal network protocol without returning the message to the protocol in which it first entered the network." Reply, 8–9.

11. The Computer and Business Equipment Manufacturers Association (CBEMA) supports ADAPSO's discussion of the differences between the gateway and common host approach to interconnection of networks with disparate protocols. Furthermore, CBEMA proposes that conversions between two basic networks—albeit involving an intermediate protocol for interconnection which differs from the protocol employed by a subscriber at its point of interconnection with one of these networks—be permitted under the general principle that protocol conversions internal to a carrier's network, which are not manifested to subscribers at their interfaces, are allowed. In CBEMA's view, use of the X.75 protocol for interconnection of X.25 packet-switched networks, would be permissible under this approach. Moreover, CBEMA argues that an approach which would allow AT&T to offer basic services encumbered by a limited number of specific protocols, e.g., X. 25, would severely limit the usefulness of the basic network as a service "building block." The supported standard might not meet the needs of an enhanced service vendor, who must then bear the overhead costs of protocol support in the basic network and the costs of conversion to the supported standard unnecessarily.

12. International Business Machines Corporation (IBM), the Computer and Communications Industry Association (CCIA) and Satellite Business Systems (SBS) argue that it would be unwise to adopt general rules addressing protocols in the absence of specific service proposals, and that such issues should be address *ad hoc*, and only in the context of specific proposals.

Issue 2

13. In its Petition for Reconsideration of the *Final Decision*, AT&T had originally raised the issue of possibly utilizing the ISO/OSI seven layer protocol model as a reference for distinguishing the treatment of various types of protocols. Its specific request was that the Commission allow any protocol processing associated with the first four levels of the ISO/OSI model to be associated with basic services. In its comments in this proceeding, however, AT&T argues that the ISO/OSI model is inappropriate for regulatory determinations of basic/enhanced distinctions, and it rather argues in favor of a flexible approach to what it terms "control signals", and to the X.75 protocol standard.

14. DOD argues in favor of utilization of the ISO/OSI model because, in its view, the model is rapidly becoming an internationally accepted standard, and all future communications systems (and specifically, Integrated Services Digital Networks, or "ISDN") will be based on the model.

15. The remaining comments argue that the ISO/OSI model does not, of itself, aid in the making of basic/enhanced distinctions and that it should not be considered further in this proceeding. Many comments argue that the model commingles basic and enhanced functions at each of the seven levels. Several comments make the point that the model, while useful as a reference for analysis, is too "fluid" and imprecise to serve as a regulatory tool, and that it is ambiguous and subject to interpretation. SBS, UST and IBM note that the data link layer protocols are enhanced. ADAPSO argues that the functions performed at each layer of the model should be focused upon if the model is to be used, and that while it would not argue against simple physical layer protocol conversions (such as two to four pronged jack conversions), any conversions

performed for the direct benefit of the user should continue to be considered enhanced. ADAPSO lists code conversion, speed conversion,[5] formatting, error detection and correction, and protocol conversion, as functions which should be encompassed in the definition of enhanced service. CBEMA argues that it can foresee problems with conversions performed even at the physical layer, as under the ISO/OSI model physical layer protocols provide for functions more complex than the level four-type functions identified by AT&T in previous pleadings. GTE/Telenet argues, however, that since physical-electrical level conversions do not depend upon computer processing, the basic/enhanced dichotomy does not apply to such conversions.

Issue 3

16. There was general agreement among the comments that the FCC should be more involved in international efforts to standardize protocols, however many comments argue that the FCC itself should not promulgate or enforce such standards. Rather, they argue that the FCC should be aware of and monitor developments in this area. AT&T states that the federal government is generally already well represented, but it argues that the FCC should monitor standards activities to ensure that its own policies are based on a full awareness of evolving standards. SBS argues that the FCC should participate directly in standard setting to avoid adoption of standards which might limit opportunities for competitive carriers. There was also some concern expressed by several parties that the FCC does not have adequate resources to participate effectively in standards activities.

Issue 4

17. AT&T argues that the packet size modification feature of the CCITT X.25 protocol standard is one of the specific conversions which must be performed in a basic network; in AT&T's view, short packets make inefficient use of network resources, and modifications which allow users to optimize transmission on their user-network access links are essential. AT&T argues that packet size modifications are not protocol conversions, and therefore that they are associable with basic services. Finally, AT&T argues that if packet size modification capabilities may only be offered by enhanced service vendors, additional equipment would be necessary in the basic network (because of claimed inefficiencies), thereby increasing costs.

18. GTE/Telenet states that it is not clear why the Commission singled out packet size changes in the *Notice* as this is only one of several features available in the X.25 protocol. In Telenet's view, if packet size modifications are allowed this might form a basis for argument about higher level protocol conversions, which would engender additional uncertainty.

19. CBEMA notes that packet size modification is often performed in premises terminal equipment separate from communications networks, and it argues that there is no evidence to demonstrate that cost savings or efficiency would result if such functions were performed within facilities providing basic service. CBEMA argues that if the X.25 packet size modification capabilities were included by AT&T, this would provide for compatibility among terminal equipments of different specifications which, in CBEMA's view, is clearly an enhanced service. Both ADAPSO and the Alarm Industry conclude that the packet size modification feature specified in X.25 covers elements defined as enhanced services.

Issue 5

20. The hearing-impaired community argues generally that allowing Baudot/ASCII

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[5] It should be noted that "speed" is not contained in the Section 64.702(a) definition of enhanced service.

conversion capabilities to be associated with basic services would be beneficial for cost savings reasons, and that it should be permitted.

21. Potential providers of Baudot/ASCII conversion services argue that such conversion is not appropriate for association with basic service. Several parties note that lower cost alternatives to in- network conversions are readily available, and that it need not be associated with basic service. Some comments argue that the long-term interests of the hearing-impaired community would better be served by the use of standard ASCII equipment, and by a phasing-out of obsolete Baudot equipment.[6] Finally, comments were received to the effect that Baudot/ASCII conversion might best be treated under waiver procedures, rather than through adoption of general rules.

Issue 6

22. AT&T argues that consumer options will be increased in the long run if protocol conversion is allowed in the basic network. According to AT&T, by allowing such protocol conversion the Commission would encourage enhanced service providers to adopt new, improved, better and more competitive services without fear of losing customers as standards change. In AT&T's view, vendors of terminal equipment would be aided by creation of a market for lower cost terminals (if functions otherwise performable in the terminals could be performed in the network), and users would be able to access a variety of enhanced services without necessarily having compatible terminal equipment if the network were permitted to perform protocol conversion. Cross-subsidization of protocol conversion offerings would, in AT&T's view, be prevented by tariffing of such offerings.

23. DOD argues that the nationwide compatibility which is possible if the basic network contains protocol conversion capabilities is attractive to users. DOD claims that the development of Integrated Services Digital Networks ("ISDN") will, in its view, require additional forms of conversion in basic networks, and that this issue should be addressed.

24. Most other comments express concern about increased opportunities for cross-subsidization if protocol conversion capabilities are permitted to be associated with basic services. Control Data, Tymnet, CBEMA, IBM and others express concern about potentially anticompetitive consequences of AT&T's market power, and about *de facto* control over protocol standards which could be exercised by AT&T if it were permitted to perform protocol processing as part of basic service.[7] They claim that this would jeopardize the service diversity, innovation, and technical fluidity which characterize the enhanced service market, and that it would affect innovationin protocol development. Telenet argues that if the *Computer II* structural separation approach is "immediately riddled with exceptions * * * it will fail to achieve its announced objectives."

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[6] These comments fail to acknowledge, however, that the "obsolete" Baudot equipment continues to be used worldwide for telex service, and that telex terminal equipment remains available.

[7] In response, AT&T argues that it would be in AT&T's best interest to offer a number of different user interfaces so that access to the network would not be restricted.

Additional Issues Raised

May AT&T offer packet-switched services?

25. AT&T argues that the outcome of this inquiry will have an impact on the degree to which regulatory barriers might restrict the evolution of the nationwide network from circuit switching to packet switching, and other advanced switching methods, and it states that it intends to introduce packet-switched capabilities in the basic network.[8] In AT&T's view, if it is to be permitted to offer packet-switched services, it would be inconsistent for the Commission to prevent the nationwide network from implementing the network control functions of X.25, which include: packetizing and statistical multiplexing, addressing, packet size modification, packet sequence numbering, call connect, disconnect, billing, level of service selection, functions required for error control, flow control, link utilization and framing.

26. ADAPSO argues that any AT&T packet-switched service must be a pure transmission capability, transparent in terms of interaction with customer-supplied information. ADAPSO predicts that AT&T's proposed packet-switching service will neither be basic nor transparent, and that to be a basic service it would be required to be configured so that information leaves the network with the same code, protocol, speed, signal strength and other characteristics with which it entered the network. SPCC argues that packet switching is not a transparent method of transmitting information, and that it requires computer processing for implementation which makes it an enhanced service.

27. GTE/Telenet posits three conditions for basic networks: (1) that they have the same transmission speed at each end; (2) that the same protocol, format and procedure is employed at each end; and (3) that the same packet size and format is employed at each end. In Telenet's view, the X.25 protocol does not meet any of these tests because users at each end may select different X.25 options. Thus, in Telenet's view, an X.25 packet-switched service is enhanced. Tymnet argues that a packet-switched service could be basic, so long as the information which exits the network is identical to the information which enters the network. IBM argues that AT&T is not prevented from adopting an interface which would allow a basic transmission service for X.25-mode terminals, but that further consideration of the basic/enhanced dichotomy might be required in the future if the AT&T basic X.25 network is to remain compatible as standards change. CBEMA argues that packet switching, as such, is not properly at issue in this proceeding, and that it can only be addressed in the context of a specific proposed service offering.

Use of waivers, rather than rules:

28. A number of comments urge that *ad hoc* waiver procedures, rather than general rules, be used to address specific protocol conversion issues as they arise in the context of specific service proposals. AT&T, however, argues that the issues of this proceeding are "too large" to be considered by waiver, and that technological planning and investment decisions would be hindered if a waiver process were employed, due to the uncertainties and potential inconsistencies which might be associated with such a process.

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[8] Subsequent to the filing of the comments in this proceeding, AT&T was authorized to provide BPSS.

Protocol conversion for terminal compatibility:

29. AT&T and DOD argue in favor of association with basic services of "data conversions" between originating and terminating premises terminal equipments which differ in physical, electrical, and logical control structure. They argue that terminal-specific protocol conversions are beneficial and necessary in basic networks. Virtually all other comments disagree and argue that terminal-specific protocol conversions are clearly enhanced services under *Computer II* which can be (and are being) performed outside basic networks.

Definition of "protocol" and "conversion":

30. NTIA suggests that protocol be defined as "a set of rules, defining syntax, semantics and timing for controlling interactions across the logical or physical boundary between two or more peer or adjacent communicating entities." GTE/Telenet and ADAPSO argue that physical layer protocol conversions (i.e., the physical layer of the ISO/OSI model) are not protocol conversion within the meaning of *Computer II* as they do not involve computer or intelligent processing. NTIA in its reply urges that processing by a network of an input without is not conversion, and it suggests a definition of "conversion" as "transformation of basic network input into a basic network output which carriers the same information but purposely represents that information in a different physical, electrical, syntactic or semantic form."

Application for Review
Fairness Doctrine, Controversial Issue of Public Importance
Personal Attack, Furnishing Substance of

> Application for review of Bureau's ruling denying Fairness Doctrine and personal attack complaint against radio station licensee denied. Complainant failed to substantiate that licensee acted unreasonably.
> *–Florida Power and Light Co.*

FCC 83–488

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
FLORIDA POWER AND LIGHT COMPANY
against
RADIO STATION WINZ
Miami, Florida

MEMORANDUM OPINION AND ORDER

(Adopted: October 19, 1983; Released: October 25, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on May 23, 1983 by Florida Power and Light (hereinafter FPL or complainant), of the Mass Media Bureau's ruling of April 21, 1983.[1] On June 7, 1983, WINZ, Inc. (WINZ), licensee of radio station WINZ, Miami, Florida, filed an Opposition to the Application for Review. Complainant filed a Reply to the Opposition on June 22, 1983. On June 24, 1983, WINZ filed a Motion to Strike.[2]

The Complaint

2. The complaint was based upon the station's broadcast "of a barrage of daily . . . announcements and editorials . . . against FPL's

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[1] A copy of that ruling is attached (Appendix A).

[2] WINZ submitted a Motion to Strike complainant's reply on the grounds that we had not requested the reply as required by Section 1.115(f) of the Commission's rules. Because of First Amendment considerations concerning broadcasters' programming judgments, we have placed high procedural burdens on complainants who file Fairness Doctrine complaints. Under these circumstances it has been the Commission's practice to permit complainants to file replies to licensees' oppositions to Applications for Review.

requested rate increase." FPL defined the controversial issue of public importance as its "pending request for a rate increase." Complainant also alleged that "[d]uring the period from September 29 through October 20, WINZ broadcast *over 200* on-the-air attacks against FPL, its requested rate increase and FPL's management." Further, FPL maintained that on October 6, 1982, its representatives met with WINZ's vice-president and station manager, Mr. Harold A. Frank, and other representatives of WINZ to discuss the licensee's campaign against its rate increase. Complainant argued that, although during this meeting WINZ offered to provide it with "the opportunity to record an unspecified number of 60–90 second statements which it promised to broadcast with unspecified frequency at unspecified times in the future," the total "number of anti-FPL announcements, statements and attacks has been grossly disproportionate to the relatively small number of pro-FPL announcements."

3. On November 10, 1982, WINZ filed its response to our November 3, 1982 letter of inquiry. WINZ accused FPL of attempting to punish it for its editorial stance against the subject rate hike. Next, the licensee agreed with the complainant that the issue was controversial and of public importance at the time of the broadcasts. With respect to the fairness portion of the complaint, WINZ argued that although there was no "mathematical equality" between the quantity of time allotted to each side, it had fulfilled its Fairness Doctrine obligation to provide a reasonable opportunity for the presentation of contrasting viewpoints for the following reasons:

> (a) Roughly 42*%* of editorializing time was devoted to pro-FPL announcements.
>
> (b) FPL announcements were broadcast during all day-parts.
>
> (c) WINZ offered to produce an *unlimited* number of announcements.
>
> (d) In addition to the FPL announcements, WINZ also broadcast news and public affairs programs even prior to the beginning of the campaign "in a fair and balanced fashion."

WINZ also denied that any personal attacks were made upon complainant's honesty, character, integrity or like personal qualities during the discussion of its proposed rate hike. Furthermore, WINZ contended, notwithstanding whether any of the statements made constituted an attack within the meaning of the rule, no particular person or group was "identified."

4. On December 1, 1982, complainant filed a "Reply" to the licensee's response. At the outset, complainant denied that its purpose for filing the complaint was "to intimidate WINZ or to silence the station in contravention of the First Amendment." Further, complainant questioned WINZ's recollection of the October 6, 1982 meeting. Complainant also accused WINZ of furnishing incomplete information to the Commission. In the Fairness Doctrine portion of its reply, FPL accused WINZ of acting "both unreasonably

and in bad faith." As to the personal attack segment of its complaint, complainant summarized eight alleged attacks and undertook a lengthy analysis of past Commission rulings to substantiate its allegation that each of the eight statements constituted a personal attack. Next, complainant argued that a particular person or group was sufficiently identified to trigger the personal attack rule. Finally, complainant took issue with WINZ's argument in which it maintained that it was not required to notify complainant because complainant "had 'demonstrated familiarity' with the attacks."

5. On December 9, 1982, complainant submitted a "Supplement to Reply," in which it accused WINZ of being guilty of "still another personal attack" against FPL, in which it "falsely accus[ed] FPL of attempting to 'intimidate' WINZ into not doing this kind of public service." FPL concluded that since WINZ did not provide it with a copy of this attack nor an offer of reasonable opportunity to respond, it committed another violation of the personal attack rule. WINZ filed a reply to complainant's supplement on December 17, 1982, in which it denied that another personal attack had been made against FPL.

6. The Bureau sent a second letter of inquiry to WINZ on December 22, 1982 in an attempt to obtain further information that would enable it to resolve the complaint. WINZ filed its response on January 11, 1983. WINZ included several affidavits to support its allegations as to the "substantial access" to its facilities which it provided FPL. On February 25, 1983, complainant submitted a reply to WINZ's letter.

Bureau Ruling

7. On April 21, 1983, the Bureau denied FPL's complaint on several grounds. With respect to the Fairness Doctrine aspect of the complaint, the Bureau noted that WINZ produced and broadcast the only four spots provided to it by complainant, broadcasting them a total of 198 times. The Bureau noted that there was a disparity between the licensee's and FPL's calculations of total time allotted to pro- and anti-FPL announcements. However, it assumed the accuracy of the licensee's calculations because complainant did not provide any information to support its claim that WINZ's calculations were inaccurate. Moreover, the Bureau relied on WINZ's statement that in addition to the pro-FPL announcements, it also broadcast news and public affairs programs prior to and during the campaign "in a fair and balanced fashion." Further, the Bureau held that "[a]lthough [FPL] alleged that WINZ's offer of reply time was restricted, [it] provide[d] no evidence to indicate that [it] made any requests for reply time which WINZ refused." Therefore, the Bureau concluded that "[t]he record before [it] clearly show[ed] a willingness by WINZ to broadcast FPL's viewpoints on the issue."

8. With respect to the personal attack aspect of FPL's complaint,

the Bureau relied on the Commission's decision in *L. E. White, Jr.*, 11 FCC 2d 687 (1968), which held that it was not necessary to determine whether a personal attack had occurred if the station had an outstanding offer of time to the complainant. Since in this case complainant was not only afforded access to WINZ's facilities but accepted it, the Bureau concluded that it could not find the licensee unreasonable in determining that it had met its personal attack obligations.

Application for Review

9. In its Application for Review compainant reiterates its complaint. At the outset FPL claims that the Bureau dismissed "out-of-hand the personal attack issue by concluding that it was not necessary to determine whether a personal attack had occurred because 'the station had an outstanding offer of time to the complainant.'" FPL denies that WINZ had an outstanding offer of time to it. It maintains that the "offer of time" to which the Bureau refers consisted of the licensee's broadcasting four different announcements a number of times, and that this occurred following an October 6 meeting. FPL further asserts that "many of the personal attacks on FPL were carried by WINZ *after* the October 6 meeting . . . and *after* WINZ allowed FPL to record its four announcements." Furthermore, FPL maintains that not only did WINZ violate the personal attack rule by not providing an opportunity to reply, but it failed to give notice and provide copies of the broadcasts. FPL also argues that the statements broadcast by WINZ, which it enumerates in its application, constituted a personal attack upon its honesty and integrity. FPL reasserts its allegation that WINZ became guilty of "still another personal attack" against FPL when it "falsely accus[ed] FPL of attempting to 'intimidate' WINZ into not doing this kind of service."

10. As to the Fairness Doctrine segment of its complaint, complainant argues that the mathematical calculations on which the Bureau relied with respect to frequency and total times of broadcast were erroneous because they were based on inaccurate figures. Complainant claims that "WINZ violated the Fairness Doctrine, in the first instance, by its failure to affirmatively 'seek out' contrasting views on the rate increase issue." Furthermore, complainant asserts that WINZ also violated the Fairness Doctrine by not providing "FPL with full and accurate information concerning its broadcasts on the FPL rate issue." Complainant argues that the Bureau failed to consider its arguments as to "WINZ's inadequate record keeping procedures." FPL alleges that in its Reply, it "documented with particularity the extent to which WINZ could not or would not furnish information concerning its programming on these two issues." Next, FPL maintains that the Bureau failed to consider its argument as to "WINZ's misrepresentations to the

Commission," which it noted in its Reply to WINZ's Opposition. According to FPL, these misrepresentations ranged from events which occurred during the October 6 meeting to the mathematical calculations regarding the time alloted to pro- and anti-FPL viewpoints. Complainant also asserts that its argument as to WINZ's distortion of the news was not considered by the Bureau. According to FPL, the distortion consisted of the use of the campaign as "a deliberate exploitation of a public issue for the sole purpose of bootstrapping the station's ratings in the Miami radio market."

11. The licensee filed an Opposition to the Application for Review on June 7, 1983. In its reply the licensee maintains the complainant failed to establish that the conclusions drawn by the Bureau were erroneous. Furthermore, regarding the personal attack aspect of the complaint, WINZ asserts, "Although FPL characterizes WINZ's offer as 'limited,' it has never alleged that the station refused any requests for air time." With respect to the Fairness Doctrine aspect of the application, WINZ maintains that the public was not left uninformed of FPL's position. Therefore, WINZ concludes, there was no fairness violation. As to the additional arguments advanced by FPL in its application, WINZ asserts that its record keeping was not inadequate. To substantiate this allegation WINZ maintains that it "has already submitted exhaustive documentation to show that it fulfilled its obligations." With respect to FPL's repeated charges regarding WINZ's misrepresentations to the Commission, WINZ ackowledges that there may been "some minor conflicts between the recollections of the parties" concerning the October 6 meeting. However, it denies that it ever misrepresented anything to the Commission. Finally, as to FPL's charge that "WINZ was engaged in a campaign to distort the news to improve its rating in the market," WINZ asserts that it provided "extrinsic evidence" which substantiated the contrary. This evidence consisted of a newspaper article in which its program director specifically denied that the station was trying to boost its ratings. On June 22, 1983, complainant filed a Reply to the Opposition in which it reiterated the arguments set out in the complaint. In response to the Opposition WINZ filed a Motion to Strike on June 24, 1983 (See footnote, 2 *supra*).

Discussion

12. Having carefully examined the pleadings before us, we cannot conclude that complianant has presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that, in view of the facts of this case, WINZ was not unreasonable in determining that it had fulfilled its Fairness Doctrine obligation to present contrasting viewpoints and had, therefore, not left the public uninformed. *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971). The Bureau noted that the

licensee produced and broadcast the only four spots provided by complainant, broadcasting them a total of 198 times, at approximately 90 seconds per spot, for a total of nearly five hours. Further, WINZ asserted that prior to "the campaign period" FPL's viewpoint was broadcast in a "fair and balanced manner." Complainant, however, claimed that the total broadcast time for pro-FPL viewpoints was approximately three hours as opposed to the nearly five hours alleged by WINZ. Nevertheless, FPL provides no information to substantiate its allegation that WINZ's calculations were incorrect, *nor does it specify the basis for its calculations*. As the Bureau noted, "A complainant has the burden of establishing that a Fairness Doctrine violation has occurred." Initially the decision whether to consider a particular subject, the specific format of the programs to be devoted to each subject, the different shades of opinion to be presented and the spokesperson for each point of view is within the broadcaster's discretion. Generally, we will review a broadcaster's decision pursuant to the Fairness Doctrine only to determine whether the broadcaster has acted reasonably under all the facts and circumstances presented. In this case, FPL has furnished no persuasive evidence to refute the licensee's determination that its overall programming both before and during the campaign was balanced and that its offer of access to its facilities was unrestricted. Furthermore, FPL does not assert that it requested and was denied an opportunity to present contrasting viewpoints.

13. With respect to the personal attack aspect of the complaint, we agree with the Bureau, that *L. E. White, Jr.*, cited above, governs. There we stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time . . . [to the complainant] to respond to the broadcasts in question." *Id.* at 687. Therefore, the Bureau correctly held that, based on the record, WINZ's offer of reply time to FPL was reasonable. As the Bureau stated, "Not only did WINZ offer [FPL] access to its facilities, but [FPL] accepted it, choosing four 90-second announcements . . . to present [its] viewpoints." Even if we found that personal attacks occurred, we note that for a substantial portion of the period during which the attacks purportedly occurred, pro-FPL announcements were also being broadcast. Furthermore, complainant did not allege that it made any requests for time which were denied. Under these circumstances we cannot find that the licensee acted unreasonably. Finally, we agree with the Bureau that in view of complainant's demonstrated familiarity with the contents of the broadcasts, it was not required that a tape or summary of the attack physically accompany any offer of reply time. *Disciples of Lord Jesus*, 52 RR 389 (B/c Bur. 1982), *review denied*, 93 FCC 2d 7 (FCC 83–83, February 25, 1983).[3]

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[3] With respect to FPL's allegation that a subsequent personal attack occurred when

14. In its application, FPL advanced some additional arguments. FPL alleged that WINZ's record keeping was inadequate. However, the Commission does not require a licensee to maintain a fairness log or diary. Rather, it requires that a licensee be aware of its programming in order to meet its fairness obligations. *Fairness Report*, 48 FCC 2d 1, 10 (1974). It does not appear from the information before the Commission that WINZ is unaware of its programming. Regarding WINZ's alleged misrepresentations to substantiate its allegations as to any misrepresentations by WINZ regarding pro- and anti-FPL programming time or the October 6 meeting. Lastly, FPL charges WINZ with distorting the news. Although a broadcaster may not engage in intentional distortion of the news, extrinsic evidence of distortion is necessary before the Commission will act. Based on the information available, it does not appear that the requisite evidence was provided.

Conclusion

15. FPL states that an "imbalanced" coverage of a controversial issue of public importance violates the Fairness Doctrine. Although this is correct, broad discretion is afforded licensees in determining what is "fair and balanced." The Fairness Doctrine does not require "mathematical equality." Rather, the broadcaster has an affirmative duty to encourage and implement the presentation of contrasting views in its overall programming, which includes statements or actions reported on news programs. The Commission reviews a broadcaster's decision to determine whether it acted reasonably and in good faith, and we will not substitute our judgment for that of the broadcaster. In this case, whether or not the Fairness Doctrine and personal attack rule were applicable to the subject broadcasts, the licensee afforded complainant access to its facilities. Furthermore, complainant had accepted this offer, and it did not allege that it ever requested and was denied an opportunity to present its viewpoint. Under the Fairness Doctrine and personal attack rule, a licensee is required to do nothing more. *Disciples of Lord Jesus*, cited above; *Hon. Henry W. Maier*, 51 RR 2d 1671 (B/c Bur. 1982), *review denied*, 93 FCC 2d 132 (FCC 83–82, February 25, 1983). We agree with the Bureau; we cannot find that the licensee acted unreasonably in this matter.

16. Accordingly, in view of the above considerations, the Applica-

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WINZ broadcast a statement criticizing FPL for filing its complaint, complainant does not establish that the issue of its filing with the Commission a complaint against WINZ is controversial and of public importance. Under these circumstances, no further comment is necessary regarding whether the statement contained personal attacks against FPL.

tion for Review filed by the Florida Power and Light Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

April 21, 1983

3771
IN REPLY REFER TO:
8330-L
Cl-486
C3-46

Florida Power & Light Company
c/o Wade H. Hargrove, Esq.
Tharrington, Smith & Hargrove
Suite 300, BB&T Building
Post Office Box 1151
Raleigh, North Carolina 27602

Gentlemen:

This is in reference to your complaint against radio station WINZ, Miami, Florida.

On November 1, 1982, you filed a complaint alleging Fairness Doctrine and personal attack rule (47 C.F.R. 73.1920) violations by the station. You maintain that in response to your petitioning the Florida Public Service Commission ("PSC") for an increase in your rates, WINZ commenced a campaign against the "FPL rate hike mania." You assert that WINZ's campaign consisted of "a barrage of daily broadcast announcements and editorials by WINZ against FPL's requested rate increase." You also allege that "[d]uring the period from September 29 through October 20, WINZ broadcast *over 200* on-the-air attacks against FPL, its requested rate increase, and FPL's management." You define the controversial issue of public importance as "FPL's pending request for a rate increase."

You state that on October 6, 1982, your representatives met with WINZ's vice-president and station manager, Mr. Harold A. Frank, and other representatives of WINZ, and that during that meeting you (1) expressed your concern over "the nature of WINZ's campaign and the irresponsible statements being made over the air about FPL"; (2) informed "WINZ's manager that the station had violated both FCC's [F]airness [D]octrine and personal attack rule . . . [and] advised WINZ that the nature and extent of its programming against FPL raised serious questions whether the station was operating in the public interest"; and (3) "requested that WINZ provide transcripts or tapes of all statements that had been aired attacking FPL and all statements that would in the future be aired in the station's continuing campaign against the power company." During this meeting, you state that "WINZ . . . also promised to provide FPL the opportunity to record an unspecified number of 60- to 90-second statements which it promised to broadcast with unspecified frequency at unspecified times in the future." Although you state that your representatives recorded several of these announcements and that commencing October 9, WINZ began to broadcast them, you argue that the number of anti-FPL announcements, statements and attacks "has been grossly disproportionate to the relatively small number of pro-FPL announcements."

With respect to the personal attack aspect of your complaint, you allege that "[t]he thrust of virtually every anti-FPL broadcast is that FPL is managed inefficiently, that FPL wastes public money, and that FPL is greedy, abusive and uncaring of the public's needs." You argue that "[t]he unrelenting nature and totality of WINZ's broadcasts" constitute personal attacks upon FPL within the meaning of the personal attack rule.

In the Fairness Doctrine portion of your complaint, you repeat your argument regarding the discrepancy between anti-FPL and pro-FPL announcements. Moreover, you argue that the response time provided by WINZ was not only too little but also too late because the offer came two weeks after WINZ began its anti-FPL campaign.

On November 3, 1982, we asked WINZ to comment on the merits of your complaint. On November 10, 1982, WINZ filed its response. WINZ agrees that your proposed rate hike was controversial and of public importance. After briefly describing the reasons for its decision to launch an anti-FPL campaign, WINZ explains that it chose to express its opposition "both by editorializing against the proposed rate hike and by organizing, in cooperation with the office of the Dade County Consumer Advocate, a petition drive whereby WINZ's listeners could express their opposition." According to WINZ the petition campaign began on October 1, 1982, and ended on October 25. With respect to the October 6, 1982 meeting between WINZ representatives and your representatives, WINZ maintains that your representatives requested that it discontinue the campaign, which it refused to do. However, the station asserts that it offered to produce and broadcast an unspecified number of spots for you at no charge; that it produced four 90-second pro-FPL spots; and that these spots were broadcast 198 times between October 8 and 25, for a pro-FPL time of 4.95 hours. Furthermore, WINZ states that approximately 330 anti-FPL editorials were broadcast, which, assuming a duration of 75 seconds per announcement, totalled 6.88 hours for anti-FPL announcements. WINZ concludes that although there was no "mathematical equality" between the quantity of time allotted to each side, it has fulfilled its Fairness Doctrine obligation to provide a reasonable opportunity for the presentation of contrasting viewpoints for the following reasons:

(a) Roughly 42% of editorializing time was devoted to pro-FPL announcements.

(b) Pro-FPL announcements were broadcast during all day-parts.

(c) WINZ offered to produce an *unlimited* number of announcements.

(d) In addition to the pro-FPL announcements, WINZ also broadcast news and public affairs programs even prior to the beginning of the campaign "in a fair and balanced fashion."

WINZ also denies that any personal attacks were made upon your honesty, character, integrity or like personal qualities during the discussion of your proposed rate hike. Citing numerous Commission rulings, WINZ maintains that criticism of public servants does not normally rise to the level of a personal attack. WINZ then reasons that you are like a "governmental body" because as a public utility you are invested with public interest responsibilities and, therefore, subject to vigorous public oversight. Furthermore, WINZ argues that even if you are not a public servant the Commission has held that mere unfavorable comments do not constitute personal attacks. WINZ concludes that "[t]he remarks disagree with FPL's *corporate* decision to seek higher rates; they do not impugn the *personal* qualities of any identified person or group."

Notwithstanding whether the remarks constituted an attack within the meaning of the rule, WINZ contends that no particular person or group was "identified." WINZ questions whether a corporation can be the object of a personal attack. WINZ further argues, that even if a corporation is a "group" within the meaning of the rule, there is still a question as to what identifiable group is deemed to be personally attacked when corporate decisions are criticized. WINZ states that since it is impossible for it to determine which person or group was personally attacked, it is within its discretion to determine that no personal attack occurred. Furthermore, whether or not its editorials personally attacked you, WINZ maintains that "the station fulfilled its responsibilities under the Commission's rule by allowing FPL substantial and continuing access to its facilities."

On December 1, 1982, you filed a "Reply" to the licensee's November 10, 1982 response. At the outset, you deny that your complaint is an attempt "to intimidate WINZ or to silence the station in contravention of the First Amendment."

You assert the following:

(a) During a meeting between the station and your representatives, you did not request WINZ to "discontinue the campaign."

(b) WINZ's allegation that you gave "no specific examples" of personal attacks during the October 6 meeting is false.

(c) WINZ's allegation concerning its "unrestricted offer" was misleading because during the meeting it refused to commit itself to anything in particular.

(d) At the October 6 meeting WINZ indicated a willingness to provide the information concerning the total number of its editorials but never did so.

(e) WINZ furnished inaccurate figures regarding the time allotted for anti-FPL statements.

As to alleged inaccurate figures, you claim that WINZ had furnished incomplete information to the Commission. Your main point of contention is a discrepancy between the total amount of time that WINZ states was allotted to anti-FPL statements and the total amount of time you claim was so apportioned. After a lengthy analysis, in which you question WINZ's restriction of the relevant time period to October 1–25, you conclude that "the relevant comparative duration is 16.65 hours for the anti-FPL view versus 3.03 hours for the pro-FPL view or a ratio of 5.5 to 1."

In the Fairness Doctrine portion of your reply you accuse WINZ of acting "both unreasonably and in bad faith." You argue that WINZ made no attempt to provide contrasting viewpoints on the subject issue and therefore violated the Fairness Doctrine. Furthermore, you assert again that there is "a substantial disparity in both the amount and frequency of broadcasts on the rate increase issue," which creates an "unreasonable imbalance" in the presentation of contrasting viewpoints.

You contend that the subject broadcasts contained language which personally attacked you, and summarize eight alleged attacks as follows:

(1) FPL is "paying off" the Florida Public Service Commission.

(2) FPL is operated by "waste and inefficiency."

(3) FPL's management has "abused" its "salary increases."

(4) FPL's managers are cutting off "life support systems" and "just don't give a damn about people."

(5) FPL is the "Florida Plunder and Loot Company."

(6) "FPL are thieves."

(7) FPL is "greedy [and] money hungry."

(8) FPL's president is "feeding off us."

Furthermore, you undertake a lengthy analysis of past Commission rulings to substantiate your allegation that each of the eight statements constituted a personal attack. You cite sixteen cases, including *Joe Faulk*, 27 FCC 2d 346 (B/c Bur. 1971). You maintain that there the Commission held statements criticizing the local city's handling of fiscal matters, which are reminiscent of the statements at issue, to be personal attacks within the meaning of the rule. You also cite *Educational Broadcasting Corp.*, 65 FCC 2d 152 (1977), which you argue involved statements accusing a landlord of cutting off heat and hot water in order to drive elderly people from their apartments. You contend that these statements, which the Commission held to constitute a personal attack, are also similar to the subject statements.

Next, you deny WINZ's allegation that as a corporation FPL cannot be the subject of a personal attack. You argue that WINZ's contention is contrary to long-standing Commission case precedent, citing cases such as *John Birch Society*, 11 FCC 2d 790 (1968) (a political organization); and *Station WGCB*, 41 FCC 2d 340 (B/c Bur. 1973) (a church). You also assert that the argument ignores the "plain language meaning" of the rule, a rule that specifies an "identified person or group."

You take issue with WINZ's final argument in which it maintains that it was not required to notify you because you had "demonstrated familiarity" with the attacks. You state this is "ludicrous" and contrary to Commission precedent. You further assert that the argument is "repugnant to the spirit and purpose of the personal attack rule because it is an attempt to shift the burden of complying with the rule from the broadcast licensee to the public."

On December 9, 1982, you submitted a "Supplement to Reply," in which you accused WINZ of "making still another personal attack" on you during a broadcast which involved your rate increase request. You maintain that you were falsely accused of attempting to "intimidate" WINZ into "not doing this kind of public service." Furthermore, you maintain that it was suggested that you might "in the future" intimidate "other media into not doing it." You conclude that since WINZ did not provide you with a copy of this attack nor offer you a reasonable opportunity to respond, it committed another violation of the personal attack rule.

On December 17, 1982, WINZ filed a reply to your supplement, denying that "still another personal attack" had been made against you. WINZ claims that no personal attack had occurred because the remarks were not made during the discussion of a controversial issue of public importance, specifically your rate increase. WINZ maintains that the remarks were made during the discussion of your complaint against WINZ which is not a controversial issue of public importance. WINZ accuses you of attempting to "bootstrap" yourself into a position where subsequent remarks broadcast by it involving the complaint could themselves trigger the requirements of the personal attack rule.

On December 22, 1982, we sent WINZ a second letter of inquiry in an attempt to obtain further information that would enable us to resolve the complaint. We requested that WINZ submit information regarding the following:

(a) any requests you made during the October 6, 1982 meeting and any offers of time made by WINZ;

(b) the amount of time devoted to pro-FPL and anti-FPL viewpoints and any limits WINZ made on your response time;

(c) WINZ's coverage of the subject issue in its *overall* coverage and the relevance of the October 1–25 time period.

WINZ filed its response on January 12, 1983. It included several affidavits to substantiate its contentions that "FPL had substantial access to WINZ's facilities to make its message known," and "[t]he station cooperated with FPL in the broadcast of its point of view." On February 25, 1983, you submitted a response to WINZ's letter of

January 12. You maintain that "WINZ ducks, bobs, weaves and once again tries to side step and avoid the important public policy issues presented in this proceeding."

Discussion

As set forth in the *Fairness Report*, 48 FCC 2d 1 (1974),[1] the Fairness Doctrine requires a licensee that presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting viewpoints. The complainant has the burden of setting forth specific information necessary to establish a prima facie case of a violation. Thus a complainant must (1) define the issue; (2) state the particular views or sides of the issue that were presented; (3) submit information demonstrating why the issue is controversial and of public importance; and (4) state the reasons for believing that the licensee failed to present or afford reasonable opportunity for presentation of contrasting viewpoints in its overall programming. *Id.*; *Allen C. Phelps*, 21 FCC 2d 12 (1969). Within this framework, you define the controversial issue of public importance as "FPL's pending request for a rate increase." The licensee acknowledges that the subject issue is controversial and of public importance. However, it maintains that it has satisfied its Fairness Doctrine obligation to present contrasting viewpoints by affording you a reasonable opportunity to reply.

The Fairness Doctrine does not require "mathematical equality" or "equal time" as would be the case if a political candidate appeared on the air during his/her candidacy. Within this framework, the Fairness Doctrine does not require *identical* treatment of both sides of the issue, since this would unreasonably burden licensees. No particular party has the right of access to the air. It is within the licensee's discretion to determine what material is presented and by whom. *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971). Consequently, the question here is not whether each side received identical treatment or an equal amount of time to present its viewpoints. Rather, "we will look to the reasonableness of the station's coverage of the opposing viewpoints with an eye towards determining whether the public has been left uninformed." *Californians Against Initiative Fraud*, 78 FCC 2d 469 (B/c Bur. 1980). In determining whether the licensee has satisfied its affirmative requirement to present contrasting viewpoints, we consider three factors: total amount of time, frequency and size of audience.

WINZ produced and broadcast the only four spots that you provided it, broadcasting them a total of 198 times. Assuming the accuracy of WINZ's 90 seconds per spot estimate, it calculated the total amount of time accorded to pro-FPL announcements as being nearly five hours as opposed to nearly seven hours for the anti-FPL view. Furthermore, WINZ maintains that even prior to the beginning of the campaign your viewpoint was also made known on news and public affairs programs in a fair and balanced manner. You contend that "the relevant comparative duration is 16.65 hours for the anti-FPL view versus 3.03 hours for the pro-FPL view; a ratio of 5.5 to 1." However, you provide no information to substantiate your allegation that WINZ's calculations were incorrect, nor do you specify the basis for your calculations.[2] A complainant has the burden of establishing that a Fairness Doctrine violation has occurred. Although under certain circumstances an unreasonable ratio may be sufficient to establish such a violation, the burden is on the complainant to substantiate its allegations as to such unreasonableness. Moreover, WINZ maintains that in addition to the pro-FPL announcements, it also broadcast news and public affairs programs prior to and during the campaign "in a fair and balanced fashion." The licensee further explains that it is an "all news and information station" and that during the time that FPL's rate request was in the news, it covered the issue fairly and reasonably. Since the burden is on the complainant to show that contrary viewpoints were not broadcast in the licensee's overall programming and you do not provide evidence to negate the licensee's allegations as to its overall programming both before and during the campaign, it does not appear you have satisfied your burden.

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[1] *Recon. denied*, 58 FCC 2d 69 (1976), *aff'd in pertinent part, remanded on other grounds sub nom. NCCB v. FCC*, 567 F.2d 1095 (1977), *on remand*, 89 FCC 2d 916 (1982).

[2] For example, you stated "[a] quick glance at the editorials suggest they are at least 90 seconds in duration," and "[i]f it is assumed that the duration of each of the 333 non-editorial anti-FPL statements was also 90 seconds," to substantiate your allegations as to the inaccuracies of WINZ's calculations. We do not believe this is sufficient.

Although you allege that WINZ's offer of reply time was restricted, you provide no evidence to indicate that you made any requests for reply time which WINZ refused. The record before us clearly shows a willingness by WINZ to broadcast FPL's viewpoints on the issue. Therefore, given the apparent overall balance of WINZ's programming both before and during the campaign and its offer of access to its facilities, we cannot find WINZ unreasonable in determining that it has fulfilled its Fairness Doctrine obligation to present contrasting viewpoints, which assures that the public is not left uninformed. *Hon. Henry W. Maier*, 51 RR 2d 1671 (B/c Bur. 1982), *review denied*, 93 FCC 2d 132 (FCC 83–82). *See* also *Californians Against Initiative Fraud*, 78 FCC 2d 469 (B/c Bur. 1980).

In addressing the personal attack aspect of your complaint, we believe the Commission's decision in *L. E. White, Jr.*, 11 FCC 2d 687 (1968) applies. There the Commission held that it was not necessary to determine whether a personal attack had occurred if the station had an outstanding offer of time to the complainant. In this case, not only did WINZ afford you access to its facilities, but you accepted it, choosing four 90-second announcements produced by WINZ to present your viewpoints. Accordingly, based on the information provided, we cannot find that the licensee was unreasonable in finding that its offer of reply time was reasonable within the meaning of the personal attack rule. Finally, we agree with the licensee that in view of your demonstrated familiarity with the contents of the broadcasts, it was not required that a tape or summary of the attack physically accompany the offer of reply time. *Disciples of the Lord Jesus*, 52 RR 389 (B/c Bur. 1982), *review denied*, 93 FCC 2d 7 (FCC 83–83). In view of the *Disciples* case the cases you cite to the contrary do not apply herein.

In view of the foregoing, no further action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Common Carrier, Rates, Just and Reasonable Charges
Common Carrier, Rates, Preferential
International Record Carrier, Rates, Tariffs

By earlier order (July 1, 1982) the Chief, Common Carrier Bureau, denied petitions to reject or suspend the captioned revisions as unjustly preferential. The Commission in this action denied applications for review of the Bureau determination that the exception embraced FTC's revisions.
–*FTC Communications, Inc.*

FCC 83-469

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
FTC COMMUNICATIONS, INC.	Transmittal No. 130
Revisions to Tariff F.C.C. No. 16	
RCA GLOBAL COMMUNICATIONS, INC. Complainant	E 82-17
vs.	
FTC COMMUNICATIONS, INC. Defendant	

MEMORANDUM OPINION AND ORDER

(Adopted: October 17, 1983 Released: October 20, 1983)

BY THE COMMISSION:

1. Before us is the application of RCA Global Communications, Inc. ("RCA"), filed July 30, 1982, for review of an order of the Chief, Common Carrier Bureau (Mimeo No. 4924, released July 1, 1982) ("Tariff Order") denying the petitions of RCA and Western Union International, Inc. ("WUI") to reject or suspend the above-captioned tariff revisions.[1] The order of which RCA seeks review permitted FTC to reduce the end-to-end international rate which it charges its own telex customers to establish a nine cent differential between the

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[1] FTC Communications, Inc. ("FTC") has filed an opposition to RCA's application. In addition, ITT World Communications Inc. ("ITT") and WUI each filed comments supporting RCA's application, and RCA filed a letter raising additional arguments. FTC has requested that we dismiss these latter filings as not authorized by the Commission's Rules and Regulations. 47 C.F.R. § 1.115.

rates those customers pay and the rates for service via other domestic record carriers. Also before us is RCA's application for review of an order by the Chief, Common Carrier Bureau (RCA Global Communications, Inc. v. FTC Communications, Inc., E-82-17, released September 2, 1982) ("Complaint Order") denying a complaint filed by RCA against FTC raising issues identical to those in RCA's application for review of the tariff order.

2. We have reviewed the Bureau's Tariff Order and find that it correctly disposed of the issues presented. We have also reviewed the Bureau's Complaint Order and agree with its conclusion that, even considering the issues in a Section 208 complaint proceeding, there is no basis for reaching a different legal result on the same undisputed facts.

3. Accordingly, IT IS ORDERED that the application for review of the Tariff Order filed by RCA Global Communications, Inc. IS DENIED.

4. IT IS FURTHER ORDERED that the application for review filed by RCA Global Communications, Inc. of the Bureau's Order denying RCA's complaint against FTC Communications, Inc. IS DENIED.

5. IT IS FURTHER ORDERED that the petition filed by FTC Communications, Inc. to dismiss comments IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment 1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

FTC COMMUNICATIONS, INC. Revisions to Tariff F.C.C. No. 16	Transmittal No. 130

ORDER

(Adopted: June 28, 1982; Released: July 1, 1982)

BY THE CHIEF, COMMON CARRIER BUREAU

1. FTC Communications, Inc. (FTC) is a record carrier subject to the Record Carrier Competition Act of 1981 (RCCA), P.L. 97–130, 95 Stat 1687. Under its recently effective tariffs filed pursuant to Commission orders implementing the RCCA[1] FTC provides both domestic and international service and interconnects with other domestic and international carriers at essentially the same rates and upon the same terms as other record carriers. In the present transmittal FTC proposes to reduce the end-to-end international rate which it provides to its own telex customers in order to establish a nine cent differential between the international rates those customers pay as compared to the rates for service via other domestic record carriers. For example, FTC would charge its own customers $1.34 per minute for a call to the United Kingdom and would charge customers of other domestic carriers $1.0432 plus the interconnection rate of the other carrier, which is generally $.384, for a total of $1.4272 per minute. Because the latter rate matches the rate of other record carriers, the effect of the proposed differential would be to give FTC's own customers a lower international rate than any other carrier presently provides, or than FTC itself gives to the customers of other record carriers. This differential would apply to all FTC's routes.

2. FTC notes that the RCCA's requirements that carriers separate domestic and international services and provide interconnection to other carriers on the same rates, terms, and conditions it offers to itself do not apply to carriers who lack a significant share of the market. The Commission has determined that FTC does not have a significant market share, and FTC contends it may therefore favor its domestic service customers. It also points out that the same rate preference was included in its earlier tariff which was rejected by

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[1] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928 (1982) (Interim Order) and Order, FCC 52–264 released June 11, 1982 (Order).

the Commission on other grounds, and that the Commission impliedly approved this preference by failing to address it.[2] Further, FTC claims that immediate implementation of this rate reduction is necessary to the company's survival. FTC incurred losses of about $3 million in 1980 and over $4 million in 1981. Its internal figures indicate a loss of about $1.3 million for the first five months of 1982. It says it desparately needs an increase in its telex traffic and that this rate reduction is its only reasonable chance for survival.

3. RCA Global Communications (RCA) filed a petition to reject or suspend and investigate these revisions and Western Union International, Inc. (WUI) filed a petition to reject. They argue that although the RCCA in Section 222(c)(1)(B), 47 U.S.C. § 222(c)(1)(B), excludes carriers who lack a significant market share from interconnecting with other record carriers on equal terms, the RCCA did not affect the Commission's authority under other sections of the Communications Act, including Section 201(b), 47 U.S.C. § 201(b), which requires that tariffs be just and reasonable, and Section 202(a), 47 U.S.C. § 202(a), which makes unlawful any unjust or unreasonable discrimination or preference. They contend the revisions are unlawful under those sections. They also argue that FTC has failed to provide adequate cost information under Section 61.38 of the Commission's rules, 47 C.F.R. 61.38. WUI suggests that the rate reduction, when matched by competitors, will only further degrade FTC's situation and urges the Commission to ascertain the impact of this reduction upon FTC's grave financial condition and on its competitors. RCA argues that if the Commission permits FTC to implement these revisions it must also permit other carriers to do so. It suggests that a careful analysis of the issues and thorough exposition of the Commission's views is essential for the future. FTC filed a reply.

Discussion

4. The RCCA was intended to foster open entry and competition in both domestic and international record communications markets and to require forbearance from regulation to the extent that competition develops. It requires interconnection among all record carriers and specifies the following obligation for carriers offering both domestic and international service:

> The Commission shall require that-
>
> (i) if any record carrier engages both in the offering for hire of domestic record communications services and in the offering for hire of international record communications services, then such record carrier shall be treated as a separate domestic record carrier and a separate international record carrier for purposes of administering interconnection requirements;
>
> (ii) in any case in which such separate domestic record carrier furnishes intercon-

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[2] The Commission stated in footnote 7 of the Order that "Arguments which we do not address were found to be without merit or mooted by other arguments."

> nection to such separate international record carrier, any interconnection which such separate domestic record carrier furnishes to other international record carriers shall be (I) equal in type and quality; and (II) made available at the same rates and upon the same terms and conditions; and
>
> (iii) in any case in which such separate international record carrier furnishes interconnection to such separate domestic record carrier, any interconnection which such separate international record carrier furnishes to other domestic record carriers shall be (I) equal in type and quality; and (II) made available at the same rates and upon the same terms and conditions.
>
> Section 222(c)(1)(B).

5. The Commission implemented this provision in its *Interim Order* by requiring that each international carrier list its domestic rate, its international segment rate, and its end-to-end rate in its customer tariffs, and reference the domestic tariffs of all interconnected carriers. This allows the customer of any domestic carrier to choose any international carrier to deliver the call. Since the international carrier passes on the domestic charge to the customer, whether the customer is connected to the international carrier's domestic network or that of another carrier, this requirement also implements the Congressional mandate of equal rates, terms, and conditions for non-affiliated domestic carriers.

6. Congress created one exception to this requirement. Section 222()(1)(B) provides:

> The requirements of clauses (i), (ii), and (iii) shall not apply to a record carrier if such record carrier does not have a significant share of the market for record communications services.

This provision was included to reduce regulation where possible and, apparently, to allow easier entry and a competitive advantage to new and small carriers. In the *Interim Order*, the Commission concluded that FTC does not have a significant market share and thus is entitled to the exemption.

7. It is our view that the statutory language is decisive and that FTC's present transmittal is exactly the sort of filing which Congress intended to permit for small carriers such as FTC. FTC is plainly permitted to favor its domestic services and customers by Section 222(c)(1)(B) even though other larger carriers such as WUI and RCA are not. RCA and WUI's arguments that this represents an unlawful discrimination are plainly in error. For one thing, all of the IRCs provided more favorable rates to their own customers vis a vis customers who accessed their international services via Western Union before the RCCA. For international service, the IRCs' customers paid a bundled end-to-end rate, but a Western Union customer from the same location would pay the full Western Union domestic rate and the bundled IRC end-to-end rate. This preference amounted to $.3475 cents per minute under the most recent Western Union tariffs (assuming no hold time or busy signals, in which case

the charge was even higher), far greater than the nine cents proposed by FTC.

8. More importantly, the specific statutory exemption created by Congress would be rendered a nullity if the very exercise of that exemption were held to be an unlawful discrimination. The specific language of the RCCA controls and FTC's proposal falls squarely within it. No investigation is needed to apply the Congressional intent. We also believe the Section 61.38 material submitted by FTC is adequate for the purposes of this filing, which is essentially based on the competitive need of a struggling carrier to increase its traffic.[3] It is also not clear that the major carriers will choose to match FTC, since FTC can maintain a differential in favor of its own customers which they may not. If they lower either their domestic or international rates, they must do so for all interconnected carriers, including FTC, and may not favor their own customers.[4]

9. Finally, we must note that the RCCA specifically mandates that

> The Commission shall, to the maximum extent feasible, promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition. In order to meet the purposes of this section, the Commission shall forbear from exercising its authority under this Act as the development of competition among record carriers reduces the degree of regulation necessary to protect the public.
>
> Section 222(b)(1).

We think it clear that this filing is a wholly permissible competitive initiative under the RCCA, and that it will foster both competition and the public interest. It also conforms to the Commission's own policies of fostering competition as implemented in the *Interim Order*. Certainly we would violate the spirit as well as the letter of the RCCA if we delayed the effectiveness of this filing beyond the necessary minimum. It may be true, as WUI contends, that these revisions will only deepen FTC's plight. That, however, is a matter of competitive business judgment. If FTC is wrong it will pay the price of its error. That is the essence of competition. If it is so successful that it acquires a significant market share it will of course be required to comply with the same rules as the larger carriers. For the present, it is entitled to take advantage of the exemption granted by Congress to carriers who lack a significant share of the market.

10. Accordingly, IT IS ORDERED, That pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R.

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[3] The Common Carrier Bureau waived Section 61.38 of the Rules in granting FTC's special permission Application No. 51.

[4] If other carriers do choose to match FTC's rate, we perceive no reason why they would not be permitted to do so.

0.291, the petition to reject filed by Western Union International, Inc. and the petition to reject or suspend filed by RCA Global Communications, Inc. ARE DENIED.

11. IT IS FURTHER ORDERED, That this order is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION
GARY M. EPSTEIN, *Chief, Common Carrier Bureau*

Attachment 2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

RCA Global Communications, Inc.
Complainant
vs. | **E-82-17**
FTC Communications, Inc.
Defendant

MEMORANDUM OPINION AND ORDER

(Adopted: August 31, 1982; Released: September 2, 1982)

By the Chief, Common Carrier Bureau

1. We have before us a complaint[1] filed by RCA Global Communications, Inc. ("RCA Globcom") alleging that FTC Communications, Inc.'s ("FTCC") Tariff No. 16 is unreasonably discriminatory in violation of § 202 of the Communications Act. As discussed below, the Complaint is denied for failure to allege facts constituting a violation of the Communications Act.

2. The background facts in this matter are not disputed. On June 22, 1982, FTCC, an international record carrier, submitted Transmittal No. 130 proposing to reduce the end-to-end international rate for telex service provided to its own customers. The effect of FTCC's proposed tariff revision would be to give FTCC's own customers a nine cent per minute lower international rate than any other carrier presently provides, or than FTCC itself charges all RCA Globcom (or any other IRC) subscribers for the same call.

3. A petition to reject or suspend these revisions to FTCC's Tariff FCC No. 16 filed by RCA Globcom was denied in a Bureau *Order* released July 1, 1982.[2] In that *Order* the Bureau held that FTCC's tariff proposal fell squarely within an express exception in the Record Carrier Competition Act of 1981 (RCCA)[3] for small carriers. Section 222(c)(1)(B) of that Act excepts a record carrier which does not have a significant share of the market from the requirement of providing equal rates, terms and conditions of interconnection as specified in the first three clauses of that Section. The tariff revision became effective June 29, 1982.

4. RCA Globcom asserts here, as it did in its petition to reject or

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[1] FTCC's Answer and Motion to Dismiss was filed August 2, 1982.

[2] FTC Communications, Inc., Mimeo No. 4924, adopted and effective June 28, 1982, released July 1, 1982. An Application for Review of this Order is pending.

[3] P.L. 97-130, 95 Stat. 1687.

suspend, that the nine cent differential constitutes *prima facie* discrimination unsupported by cost information and is in violation of § 202 of the Communications Act. It contends that FTCC has the burden of proving the lawfulness of the *prima facie* discrimination, citing *ITT World Communications, Inc.*, 70 FCC 2d 1316, 1328 (1978).

5. RCA Globcom has raised no arguments in this complaint which were not fully considered by the Bureau in its denial of RCA Globcom's petition to reject or suspend. No reasons have been advanced to convince us that our prior ruling was incorrect. The fact that RCA Globcom now raises these same issues in a Section 208 complaint proceeding does not provide any basis for reaching a different legal conclusion on the same undisputed facts.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 CFR 0.291, that RCA Globcom's complaint is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
GARY M. EPSTEIN, *Chief Common Carrier Bureau*

International Communications
Notice of Inquiry

Notice of Inquiry adopted regarding international communications policies governing designation of recognized private operating agencies, grants of IRUs in international facilities and assignment of data network identification codes.

–International Communications

CC Docket No. 83–1230

FCC 83–516

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes	CC Docket No. 83–1230

NOTICE OF INQUIRY

(Adopted: November 8, 1983 Released: December 22, 1983)

BY THE COMMISSION:

1. In the instant notice we institute an inquiry looking toward adoption of procedures and policies to better accommodate emerging competition in international communications with the formalities of international requirements and conventions. Specifically, we shall inquire first into the need or desirability of our developing a policy regarding conferral of Recognized Private Operating Agency (RPOA) status upon non-carrier service providers. Second, we seek to develop a policy concerning the right of enhanced-service providers and other non-common carriers to acquire IRUs,[1] or other ownership, in international transmission facilities, the ownership of which has heretofore been limited to common carriers. Third, we shall inquire whether we now need formal policies for processing requests for assignment of a Data Network Identification Code (DNIC).

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[1] The term IRU, or indefeasible right of user, refers to a type of ownership of transmission facilities in which the IRU holder has most of the indicia of ownership, but lacks the right to control the facility or, depending on the particular IRU contract, any right to salvage.

2. In our Final Decision in the *Second Computer Inquiry* (*Computer II*)[2] we drew a distinction between traditional, common-carrier communications, or "basic services," and those "enhanced services" which combine basic services with computer data processing. Our finding that enhanced services fall outside of Title II common-carrier communications applied without distinction both to domestic and international offerings. Subsequently, on August 5, 1982, we reaffirmed our holding concerning the applicability of *Computer II* to international services of U.S. vendors. *GTE Telenet Communications Corp.*, 91 FCC 2d 232 (1982).

3. On September 24, 1982, the Association of Data Processing Service Organizations (ADAPSO) filed a petition seeking reconsideration of our August 5 *Telenet* decision. Subsequently, on March 29, 1983, ADAPSO submitted a Petition for Rulemaking and Request for Stay, RM-4435 (hereafter the ADAPSO Petition), formally seeking a stay of our *Telenet* decision and institution of a rulemaking looking into a variety of issues that it believes must be resolved before *Computer II* can be extended internationally.[3] Because they may have a bearing upon the implementation of our *Computer II* policy in the international market, we shall include in our inquiry two of the issues ADAPSO raised: the need for a policy governing conferral of RPOA status and the need to clarify the right of non-carriers to acquire IRUs in cable facilities. We shall not, in this proceeding, consider ADAPSO's request for stay of our *Telenet* decision.

4. The right of non-carriers to own IRUs in transmission facilities was also raised in a series of petitions filed by Aeronautical Radio Incorporated (ARINC), a communications user group in the airline industry, which seeks a ruling from this Commission that it and other non-carriers are entitled to purchase IRUs in circuits in submarine telephone cables. More specifically, we have pending before us a Petition for Declaratory Ruling, filed by ARINC on March 31, 1981, seeking IRUs in 10 voice-grade circuits in the seventh transatlantic submarine telephone cable (TAT-7). As will be discussed more fully below, while we find nothing in the Communications Act which would bar non-carriers from ownership of cable IRUs, such ownership is a question of public policy. We thus have decided to include those policy questions in the inquiry we institute

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[2] Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3826 (U.S. May 16, 1983).

[3] We do not here rule on ADAPSO's pending request for reconsideration of *Telenet* or to stay implementation of our *Computer II* policy internationally, pending inquiry on the issues it raises. We have already found that the enhanced/basic service dichotomy applies to the international market, *see especially* 84 FCC 2d 50, 53, f.n. 4, and have reaffirmed that conclusion in the *Telenet* decision, *supra.*

here. We shall hold the ARINC petition to acquire circuits in TAT-7 in abeyance pending the outcome of this proceeding.[4]

5. We also have before us requests by a number of non-common-carrier entities seeking assignment of DNICs. A DNIC is a unique four-digit number designed to provide a discrete identification of individual public data networks. The assignment of a DNIC to a particular data network allows network switches throughout the world to recognize that network and to direct traffic to it. Assignment of a DNIC is, therefore, useful to a service provider's business. The Commission now informally assigns DNICs. However, to date, we have never formally adopted any policies regarding their issuance. Because the number of DNICs available for U.S. use is potentially limited, and because extension of our pro-competitive policies to international services may increase the number of entities to whom a DNIC would be useful, we believe it is now timely to inquire whether we need more formal policies for assignment of DNICs. Accordingly, we shall also include this matter in the inquiry we are instituting here.

6. We believe that the three areas of inquiry in this proceeding have a bearing upon the efficient implementation of our pro-competitive policies and that they are at least potentially interrelated. What we decide with respect to one of them could affect our policies with respect to the others. We therefore have elected to examine them in a combined proceeding where we can explore possible interrelationships. We thus put out for public comment the petitions and issues discussed herein. We shall also provide for the filing of reply comments.

SUMMARY OF PETITIONS

7. *ADAPSO Petition for Rulemaking.* In its petition ADAPSO claims a "lack of symmetry" between our basic/enhanced dichotomy and the scheme developed by the ITU Convention and the CCITT Telephone and Telegraph Regulations promulgated thereunder.[5]

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[4] ARINC's petition is limited to IRUs in cable circuits. There is another form of participation in cable systems, joint ownership, in which the co-owners share ownership in proportion to their investment. By contrast to the IRU, the co-owners hold all the traditional elements of ownership. Control is exercised by vote of the owners, each in proportion to its investment share. *See* American Telephone and Telegraph Co., 37 FCC 1151 (1964). The most common pattern today is for ownership to be limited to the original participants and for any subsequent participants to acquire circuits by IRU. In the inquiry we institute herein we shall put the ARINC request out for comment. Comment on extending joint ownership participation to non-carriers as well as any other form of capital participation can also be made.

[5] The International Telecommunication Convention (hereafter ITU Convention) is the basic instrument creating and defining the role of the International Telecommunication Union (ITU). The ITU is a specialized agency of the United Nations whose primary function is to set technical standards for world telecommu-

That is, ADAPSO states that the CCITT regulations draw a distinction between "telecommunications" and "data processing," while the Commission draws a distinction between "basic" and "enhanced services." This is a problem, ADAPSO believes, because, "while all of the services which the Commission classifies as 'basic' would be considered 'telecommunications' under the CCITT regulations, and while all of the services which foreign PTTs would classify as 'data processing' would be considered as 'enhanced' by the Commission, the converse is not true." ADAPSO Petition at 12. ADAPSO believes that the Commission would not classify all of the CCITT's "telecommunications" services as basic, nor would the CCITT classify all U.S. "enhanced" services as "data processing." *Id.* ADAPSO argues that the ITU Convention contemplates that all telecommunications channels "open to public correspondence" will be provided by "administrations" or "recognized private operating agencies."[6]

8. ADAPSO notes, however, that, under our *Computer II* policies, enhanced-service providers are not considered carriers, but customers of carriers, and will not be licensed under the Communications Act. As a result, ADAPSO argues that such service providers will not be "recognized" by the U.S., within the meaning of the ITU Convention, and might be considered by foreign PTTs[7] to be operating unlawfully "in the manner of an Administration," an act prohibited by Section 7.3(d) of CCITT Recommendation D.1.[8] To

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nications to prevent destructive interference and to develop the basic operating arrangements under which member nations communicate. The United States is a member Administration of the ITU. The ITU Convention has the status of a treaty under United States law. The ITU has a number of subsidiary bodies charged with carrying out particular aspects of the ITU's responsibilities, the most important of which for present purposes are the CCIR and the CCITT, the International Radio Consultative Committee and the International Telegraph and Telephone Consultative Committee, respectively. These committees develop technical and service regulations and recommend standards applicable to their respective areas of responsibility. The edition of the Convention in effect until January 1, 1984, is that signed at Malaga-Torremolinos, Spain, on October 25, 1973, and known as the Edition Malaga-Torremolinos, 1973. On November 6, 1982, the Plenipotentiary Conference at Nairobi, Kenya, adopted amendments to the Convention which will become effective on January 1, 1984. In the discussion which follows, citations to the ITU Convention will be to the current Edition Malaga-Torremolinos.

[6] *See* paras. 25–7 and associated footnotes, *infra.*

[7] In this Notice the term PTT will be used to designate any government-owned or -operated communications entity. The term itself is a shorthand expression for the Ministry of Posts, Telegraph and Telephone. In most countries communications services are provided by governmental entities. Frequently voice or telephone services are combined with the postal and telegraph services into a single entity, the Ministry of Posts, Telegraph and Telephone. The concept of the PTT is not precisely synonymous with the term "Administration" as used in the ITU Convention, which refers to the government itself rather than the entity providing service, but for the discussion that follows the terms will generally be used interchangeably.

[8] ADAPSO notes that Section 7.3(d) of Recommendation D.1 provides that "the

assure that foreign PTTs will agree to operate with U.S. enhanced-service providers, ADAPSO suggests that we adopt a program to confer RPOA status upon these enhanced-service providers who provide services which would be classed as "telecommunications" under the ITU Convention.

9. ADAPSO argues that such a program is necessary and could be effected without contravening our determination that enhanced-service providers should not be licensed or otherwise regulated. That is, ADAPSO recommends a program modeled after our current equipment-registration program (Part 68 of our Rules) and based on our ancillary jurisdiction under Title I of the Communications Act. Under this program, ADAPSO argues that a service provider wishing to provide a "public correspondence" service and willing to be bound by the ITU Convention could seek Commission "accreditation" or "certification" as an RPOA. ADAPSO argues that an RPOA-accreditation program would not generate many of the issues raised by our traditional licensing process and, thus, could be carried out on a more informal basis, with a limited notice and comment period. However, because Article 44 of the ITU Convention requires the United States to assure RPOA compliance with international regulations, and possibly also to revoke a grant of RPOA status upon violation thereof, ADAPSO believes grant of RPOA status should not be entirely ministerial and should not, therefore, be automatic.

10. Believing that it will reassure foreign PTTs that their rights will be honored, and thus assure that flat-rate leased channels will continue to be available, ADAPSO recommends that we institute a rulemaking to develop a formal program of RPOA accreditation. In that connection, ADAPSO outlines five issues it believes should be addressed in such a rulemaking: (1) the grounds, if any, for petitions to deny a grant of RPOA status; (2) a determination of the entities to whom an RPOA program should apply; (3) the relationship of an RPOA accreditation program to the traditional Section 214 licensing program applicable to basic-service-providers; (4) the need for separate RPOA accreditation of individual corporate affiliates; and (5) what conditions should be attached to issuance of a grant of RPOA status.

11. ADAPSO has also raised a question concerning the right of enhanced-service providers to own their own facilities. ADAPSO notes that our *Computer II* decision required AT&T, a "facilities-owning" common carrier, to offer enhanced services only through a

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customer shall not be permitted to operate in the manner of an Administration by providing telecommunications services to others." According to ADAPSO the consequences of such a finding are, as provided in Section 1.10 of Recommendation D.1, that the "Administration shall refuse to provide an international private leased circuit when the customer's proposed activity would be regarded as an infringement of the functions of an Administration in providing telecommunications service to others."

subsidiary and required that subsidiary to acquire all its basic transmission facilities only pursuant to tariff. ADAPSO notes, however, that AT&T's overseas leased-channel tariff, forbids resale of those services. *See* AT&T Tariff FCC No. 260, Section 6.3.5. ADAPSO argues that we have never clarified whether the AT&T enhanced-service-provider subsidiary "owns" the facilities it acquires under tariff from its parent or whether its use of them would constitute a prohibited resale. Similarly, ADAPSO notes that our *Authorized User Revisited* decision, 90 FCC 2d 1394 (1982), *appeal pending sub nom. ITT World Com v. FCC* and consolidated cases, Case No. 79–1046, *et al.* (D.C. Cir., docketed September 16, 1982), *stay granted* March 1, 1983, allowed non-carriers such as enhanced-service providers to acquire satellite circuits from Communications Satellite Corporation (Comsat), but does not clarify whether those entities "own" the facilities or resell them, again in apparent conflict of ITU Regulations. ADAPSO believes that implementation of our pro-competitive international policies requires clarification of this point and, particularly, whether enhanced-service providers can own their facilities or are required to acquire them only under tariff.

12. Finally, ADAPSO notes that the IRCs' tariffs restrict the resale and shared use of their basic transmission services. That being the case, ADAPSO notes that if we adopt an RPOA-accreditation program we should decide whether the resale prohibitions will prevent an RPOA from using those services to offer enhanced services.

13. *ARINC Petition for Declaratory Ruling.* In its petition for declaratory ruling ARINC seeks a finding that non-carriers are eligible to acquire IRUs in submarine cables. More particularly, ARINC requests us to require AT&T to make available to ARINC IRUs in 10 circuits in TAT-7. ARINC had first raised the question of non-carrier cable IRUs in connection with its petition for partial reconsideration of our order and authorization, of the TAT-7 cable, *American Telephone and Telegraph Co.*, 73 FCC 2d 248 (1979). We denied ARINC's request because it had not raised the issue at an earlier stage of the proceeding. *American Telephone and Telegraph Co.*, 83 FCC 2d 1 (1980).

14. ARINC then reiterated its request in the pending petition for declaratory ruling. In support of its petition ARINC argues that in authorizing the cable we retained the power to reallocate circuits to other U.S. carriers and that we should extend that power to include assignment of IRUs to non-carriers. ARINC notes that nothing in the Communications Act specifically limits cable IRUs to common carriers or forbids non-carrier participation in cable ownership. ARINC analogizes its request to the *Above 890 Decision*, 27 FCC 359 (1959), in which we found that we can license private microwave-communications networks using frequencies above 890 Mhz. ARINC notes that in *Above 890* we specifically rejected an argument by the

carriers that non-carriers may not be licensed to operate private radio facilities as well as the argument that private licensing would be likely to cause a scarcity of frequencies and generally higher costs. 27 FCC at 411. Moreover, ARINC notes that we rejected an argument of the carriers that private licensing would divert revenues and cause them severe economic harm, and asserts that events since that decision have demonstrated the correctness of that holding.

15. In short, ARINC argues that its proposal for non-carrier IRUs is similar to the private licensing of microwave systems we found lawful in *Above 890*, and that it raises no legal or policy problem that we did not address in that proceeding. Further, ARINC believes that granting non-carriers IRUs in cables is consistent with our pro-competitive policies and will put pressure on international leased-channel rates. ARINC notes that the activation schedules in Docket No. 18875[9] show that TAT-7 will not be fully loaded and that AT&T, thus, has idle circuits it can make available to ARINC.

16. The ARINC petition was opposed by AT&T and two international record carriers, RCA Global Communications, Inc. (RCAGC) and Western Union International, Inc. (WUI). AT&T bases its opposition upon its property rights in the TAT-7 cable. That is, AT&T argues that AT&T and the other co-owners of TAT-7 have a protected property interest in the TAT-7 cable. According to AT&T, the fact that the cable has been devoted to common-carrier use does not deprive it of its private rights. AT&T argues that the Communications Act requires common carriers to make communications services available to the public but does not require them to give up private property to their customers. AT&T analogizes this situation to the power of eminent domain and argues that the Communication Act does not give the Commission that right. AT&T further argues that even the power of eminent domain is limited in that the government is permitted to take private property for public use but is not permitted to take such property for the benefit of another private entity—even where compensation is provided. Because ARINC is a private entity, which seeks the facilities to advance its private interests, AT&T argues that ARINC's request would contravene this principle and would constitute a violation of the due-process clause of the Fifth Amendment to the United States Constitution.

17. Beyond this, AT&T argues that the *Above 890 Decision* is not applicable to questions of private property. AT&T notes that *Above*

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[9] Overseas Communications, 76 FCC 2d 326 (1979). In that proceeding we approved a facilities construction-and-use plan for the North Atlantic Ocean Region for the period 1981–1985. That plan shows the planned use of all facilities in the North Atlantic through 1985. The figures in the plan show that not all circuits in TAT-7 will be fully activated by the end of 1985. AT&T notes, however, that all circuits in TAT-7 will be activated by the end of 1986.

890 deals with the public airwaves and allows private persons to build private microwave systems operating in a limited frequency band that at the time of the decision had not previously been allocated to any use. Because the electromagnetic spectrum does not belong to any individual, AT&T argues that our licensing of the private use of particular frequencies does not involve any private interests and that the *Above 890 Decision* cannot support a proposal to take TAT-7 circuits from AT&T and its overseas correspondents. Finally, AT&T notes that ARINC is incorrect in asserting that there are idle or spare circuits in TAT-7. While AT&T notes that the Docket No. 18875 loading plan does not show TAT-7 as being full, the plan only extends through the end of 1985. All circuits in TAT-7 have been assigned to the co-owners. AT&T also notes that all 4400 circuits are scheduled to be used by the end of 1986.

18. Both RCAGC and WUI comments essentially repeat AT&T's property-law arguments and assert without elaboration that a grant of private IRUs will disserve the public interest and lead to higher charges for common-carrier services. In its reply to the oppositions ARINC does not address property-law arguments directly. Rather, ARINC repeats its own arguments concerning the *Above 890 Decision* and the competitive benefits it sees from granting private cable IRUs. Finally, ARINC reiterates its view that our retention of power to reasign cable circuits to carriers can extend to non-carriers as well.

19. ARINC has also raised the issue of non-carrier cable IRUs in connection with our consideration of AT&T's application for authority to participate in the construction of the Third Florida - St. Thomas (St. Thomas 3) submarine cable. ARINC filed comments in support of AT&T's application in which it requested the right to acquire IRUs in five circuits in the St. Thomas 3 cable.

20. In authorizing the cable, we dismissed ARINC's petition, but did not not deny its request for circuits. *American Telephone and Telegraph Co.*, 88 FCC 2d 1630 (1982). Rather, we indicated that we would consider the rights of non-carriers to own cable circuits in the context of its petition for declaratory ruling. Subsequently, ARINC filed a petition for clarification of the St. Thomas 3 order asking us to make clear to AT&T and its co-owners that AT&T's authorization to participate in the cable is conditioned upon the possibility that it may be required to make IRUs available to ARINC or other non-carriers. That petition is still pending. Finally, on July 30, 1982, in response to a request from AT&T seeking to hear from those interested in participating in the construction of the eighth transatlantic telephone cable (TAT-8), ARINC stated that it so wishes and that it would need an IRU in one high-speed-data-transmission circuit of 1.544 Mops (megabit per second). AT&T responded that it would await our ruling on the ARINC petition before it would talk further.

DISCUSSION

21. After considering the petitions and other matters before us, we have concluded that their resolution is important and should be addressed in comprehensive manner. As a result we have decided to institute an inquiry into the following issues: the circumstances under which U.S. entities operating internationally should be granted RPOA status; the circumstances, if any, under which non-common-carriers should be able to acquire IRU interests in international cable facilities; and the need for procedures governing the issuance of DNICs. We further recognize that resolution of these questions will assist in the implementation of our pro-competitive policies with respect to United States service vendors providing service internationally. For this reason also we conclude that institution of this proceeding will serve the public interest.

22. *RPOA Status*. We shall first address the proposal in ADAPSO's petition that we adopt procedures for the formal "accreditation" of recognized private operating agencies.[10] We note at the outset that the RPOA concept has significance under the ITU Convention and in relations among ITU members; it has, however, had no particular significance under our internal United States law or practice. As will be discussed more fully below, the RPOA concept is a mechanism to facilitate operation of the ITU by regularizing relations between those member nations who place responsibility for communications matters in the hands of governmental entities such as the PTTs and government-owned broadcasting services, and those (such as the United States) who place their communications and broadcasting services in the hands of private, non-governmental corporations. RPOA status gives such private entities an official status in the ITU, which is primarily an organization of governments, and allows such entities to contribute to the work of the ITU while reassuring the governmental members that the private entities will abide by the international regulations. The ITU, thus, uses the RPOA concept to facilitate international cooperation in resolving communications issues and to avoid destructive interference.

23. In its petition ADAPSO suggests that the RPOA concept may similarly be useful as a way to regularize our treatment of "basic"

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[10] Responsibility for granting RPOA status rests with the Department of State as the representative of the United States in the ITU. There is now no codified procedure for granting RPOA status. An entity wishing to obtain such a designation notifies the Department of State to that effect. The Department of State consults with the Commission to determine whether the entity has been issued a Section-214 certification. The Department of State has carried out that function in consultation with the Commission, but it retains ultimate responsibility. We thus undertake in this proceeding to develop a recommendation to the Department of State. We shall also solicit the views of the Department of State upon the issues raised in this inquiry.

and "enhanced" services under *Computer II* with the views of other governments that "telecommunications" services should be provided only by an administration or regulated entity. Our *Computer II* policies, of course, apply only to U.S. service vendors, and not to those of other countries. Still, as ADAPSO suggests, overseas entities have tended in the past to treat all U.S. service vendors as "carriers" and to regard them as analogues of their own (often governmentally-owned) communications entities. As a result the foreign entities may be unsure of the status of U.S. enhanced-service providers or their obligations. It is in this context that ADAPSO believes the RPOA concept may have utility in reassuring the overseas entities. If ADAPSO is correct, we believe that it will be useful to solicit public comment on this question.

24. ADAPSO suggests that the Department of State, the agency which has responsibility to represent the United States in the ITU and which designates United States entities as RPOAs, ties the conferral of such status to receipt of certification under Section 214 of the Communications Act. While this may generally be true, as is discussed below, at least one non-carrier, ARINC, has been granted RPOA status. Since it may also make sense for the Department to grant RPOA status to other non-carriers as well, it will be useful to solicit the public's views on the circumstances under which that would be appropriate. We note in the following discussion that the ITU's RPOA concept does not turn upon an entity's "carrier" status under the laws of any nation, but rather upon notions of public correspondence, and that provision of enhanced services would appear to fall within this category. Thus, it appears appropriate to inquire into the Department of State's RPOA-accreditation procedures with a view towards making the comments and any report which we make thereon available to the Department to provide a basis for it to make any changes in its practices which may prove appropriate. The result may well be that no change is necessary.

25. In sum, the *Computer II* distinctions between carriers and enhanced-service providers arise under United States law and govern United States entities. Other administrations may take the view that their communications providers should provide both types of offerings in their own nations. This is their decision to make, just as it is their decision whether telecommunications services should be provided as a governmental function or a private-sector one. The RPOA concept is not predicated upon carrier or non-carrier status under United States law, and as ADAPSO suggests, it may provide an appropriate mechanism for participation by non-carrier, enhanced-service vendors in international telecommunications and the ITU regardless of whether the administration at the foreign end does, or does not, observe similar service distinctions in its own nation. In this context, we seek comment herein on United States

policy and procedure relating to conferral of RPOA status on United States service providers.[11]

26. For most of the twentieth century, the concept of the RPOA appears to have been more-or-less synonymous with our notion of the "common carrier." Indeed, the concept itself arose from the attempt of the ITU to deal with the U.S. private carriers. Most of the countries of the world have elected to place responsibility for their communications in the hands of the central government. Until 1932 the ITU Convention provided for membership only of governmental "administrations."[12] In that year, at the request of the United States, the designation of "Private Operating Agency" (POA) was added to the Convention to deal with the situation of countries such as the United States which have entrusted their communications to a private entity other than the government.[13] This category allowed most private communications entities that actually provide service and are most affected by ITU actions to participate directly in the work of the ITU.

27. In 1947 the term "Recognized Private Operating Agency" (RPOA) was added to the Convention to make clear that a private entity which is incorporated within the jurisdiction of one nation but which operates in another, or in more than one country or geographical area, is "recognized" by both the government of its home and the government of any country or area(s) in which it operates—that is, that all relevant governments have agreed to recognize the entity and to make it responsible for discharging obligations under the Convention.[14] Under the ITU Convention,

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[11] In the discussion below, we address distinctions between the terms "data processing" and "telecommunications" used by the ITU. We wish to emphasize that while such distinctions may have meaning for the international purposes of the ITU, they have, and will continue to have, no effect upon our internal distinctions between enhanced and basic services under United States law. In the context of RPOAs, the notion of "public correspondence" offerings has some relevance, as we discuss, but not the "data-processing," "telecommunications," "basic," "enhanced," "carrier" or "non-carrier" labels which might be assigned to various offerings under the disparate classification approaches which are available in the United States and elsewhere.

[12] An "administration" is defined under the ITU Convention as

> Any governmental department or service responsible for discharging the obligations undertaken in the International Telecommunication Convention Union and the Regulations.

International Telecommunication Union, International Telecommunication Convention, Annex 2, p. 135 (Edition Malaga-Torremolinos, 1973).

[13] A "Private Operating Agency" is defined under the ITU Convention as "[a]ny individual or company or corporation, other than a governmental establishment or agency, which operates a telecommunication installation intended for an international telecommunication service or capable of causing harmful interference with such a service." *Id.* at 136.

[14] Under the Convention an RPOA is defined as "any private operating agency . . .

therefore, the concept of RPOA includes two key concepts: the offering of a "public correspondence"[15] and the imposition upon it of the obligations of Article 44 of the Convention.[16] The decision as to who will be designated as an RPOA is left to the individual members.

28. As ADAPSO has noted, RPOA status has historically generally been accorded to those who "function like an administration"—that is, who offer the kinds of communications services offered by the PTTs—and, in this country, to certificated common carriers.[17] We do not believe, however, that only "common carriers" in the traditional U.S. sense of the term are encompassed in the RPOA concept of the ITU. We note, for example, that ARINC has been granted RPOA status, although it is not a common carrier and has never been certificated under Section 214 of the Communications Act. ARINC is a user group which provides communications services for its constituents on a not-for-profit basis. ARINC's services are open only to its members and, as a result, do not constitute a "public correspondence" as that term is used in the definition of RPOA. ARINC is also not a "broadcaster" within the meaning of the definition. ARINC does operate High-Frequency, point-to-point radio circuits which are capable of interference with the use of radio by other ITU member nations and that may be the reason it was designated an RPOA. Inasmuch as ARINC has been an RPOA for

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which operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 44 of the Convention are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunications service in its territory." *Id.*

[15] "Public correspondence" is defined under the Convention as "[a]ny telecommunication which the office and stations must, by reason of their being at the disposal of the public, accept for transmission." *Id.* at 135. "Transmission" is not separately defined in the Convention. It is apparently used here as a synonym for "telecommunication" which is defined as "[a]ny transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems." *Id.* at 137.

[16] Article 44 provides that:

> 1. The members are bound to abide by the provisions of this Convention and the Administrative Regulations in all telecommunications offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio service or other countries, except in regard to services exempted from these obligations in accordance with the provisions of Article 38.
>
> [Article 38 pertains to the National Defense].
>
> 2. They are also bound to take the necessary steps to impose the observance of the provisions of the Convention and of the Administrative Regulations upon private operating agencies authorized by them to establish and operate telecommunications and which engage in international services or which operate stations capable of causing harmful interference to the radio services of other countries. ITU Convention at 25.

[17] A listing of all entities who have been designated RPOAs by the United States is attached as Appendix 1 to this Notice.

many years without complaint, it is clear that common-carrier status is not a prerequisite for designation as an RPOA. More recently, at least one enitity, GTE Telenet, which provides what we class as an enhanced service, has been granted RPOA status.[18] We similarly do not regard GTE Telenet's offering of enhanced services as preventing its designation as an RPOA.

29. Thus, it is appropriate to inquire as to what currently, by State Department practice, is encompassed by the category of who may be designated by the United States an RPOA, and whether it should be broadened. We do not agree with ADAPSO, however, that the determining factor is whether one provides what is classed as "telecommunication" under the ITU Convention. In the first instance, the term telecommunication as used in the Convention is extremely broad, encompassing any electromagnetic communications system. *See* f.n. 15, *supra*. The ITU definition is not the equivalent of the term "common carrier" under the Communications Act. *See* 47 U.S.C. Section 154(h). Rather, it appears to be generally equivalent to the definitions of "wire communications" and "radio communications" under that Act, definitions which encompass more than common carriage. *See id.*, at Sections 154(a) and (b).[19] Under the view advocated by ADAPSO, everyone making an electromagnetic transmission might be required to be an RPOA, even if the transmission were purely domestic and purely for the sendor's own business. The ITU's definition of RPOA, however, clearly requires a "public correspondence" as an element of RPOA status.

30. We believe that the drafters of the RPOA definition had two practical concerns: to prevent uncontrolled interference and, with respect to entities operating outside their home countries, to allay the fear that government would not be in a position to enforce ITU obligations; and to allow those private entities that provide services akin to those offered by PTTs an opportunity for full participation in the ITU. While we recognize that we cannot unilaterally alter the definition of an RPOA, it does not appear necessary for the United States to adopt a rigid position on who the United States should or should not designate as such. Rather, there may be mechanisms which ensure that we honor our obligations under the Convention, and which result in responsible compliance of all U.S. service providers with ITU regulations, without the necessity for a complicated certification process.

31. From the ITU point of view, the nature of the service offered

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[18] GTE Telenet was a certificated common carrier at the time it was designated an RPOA, but offered what we classify as an "enhanced service."

[19] Section 3(a) defines "wire communication," and Section 3(b) "radio communication," as the "transmission of writing, signs, signals, pictures and sounds of all kinds [by wire or radio, respectively] between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services . . . incidental to such transmission." 47 U.S.C. Sections 153(a) and 153(b).

is not what determines RPOA status—whether "telecommunications" or "data processing," or "basic" or "enhanced," or some otherwise-defined hybrid. So long as the ITU regulations are adhered to, whether an entity is formally designated an RPOA, or a POA, or some other classification is probably of no practical significance. Certainly, as a Member of the ITU, the United States will continue to require its nationals to operate in accordance with the ITU regulations whether or not they are designated an RPOA. Thus, a broad view of "public correspondence" which could cover a broad range of services ranging from telecommunications to those that encompass elements of data processing may be reasonable in these circumstances.

32. In fact, the bulk of the services we in the United States classify as enhanced services would fall either in the category of "telecommunications" or "data processing" under the ITU Convention. As a result, issues pertaining to both such services are already being discussed in ITU working groups. Furthermore, while we in the United States class certain services as enhanced and choose not to regulate the entities providing them, internationally many of the same services are provided by the PTTs who also provide more traditional services. The PTTs are full participants in the ITU and represent themselves. With respect to the providers of those services already provided by PTTs and others fully represented at the ITU, then, a strong argument in favor of RPOA status can be made to provide parity for United States service providers.

33. Furthermore, it appears reasonable for RPOA accreditation to be voluntary. We see nothing to be gained by an obligatory process, since there is no reason to force an entity to seek formal RPOA status if it does not choose to do so. This being the case, an entity ought to be free not to seek RPOA status if it sees no benefit therefrom.

34. As suggested in ADAPSO's petition, it appears reasonable that RPOA accreditation need not entail certification by the FCC under Section 214 or common-carrier regulation under Title II. ADAPSO does not elaborate upon its argument that a grant of RPOA status should not be automatic; it neither shows why an automatic grant will cause adverse consequences, nor how making case-by-case judgments will better assure that the ITU Regulations are observed. The imposition of the duty to observe ITU regulations does not require the Commission to pass upon the fitness of a provider of international service. Neither does our duty under the ITU Convention require us to guarantee that an entity will observe the standards. The Commission cannot as a practical matter guarantee the actions of private entities, whether they are RPOAs or not. All we can do is to monitor the situation and to take action to rectify the problem when we learn of violations. We thus incline to the view that RPOA accreditation should be fairly routine.

35. RPOA status confers upon an entity a class of membership in the ITU and its working subgroups which is second only to that afforded governmental administrations. RPOAs are full participants in the work of the ITU and can contribute their views in the development of new ITU standards. RPOA status, thus, allows such entities a favorable opportunity to seek to advance their corporate goals in the working groups and committees.[20]

36. Some have also expressed the view that conferral of RPOA status would also yield the benefit of greater world recognition and aid U.S. enhanced-service providers in obtaining operating agreements with foreign PTTs and administrations. For example, ADAPSO argues that RPOA status could in some sense take the place of Commission certification of carriers. We are not certain whether RPOA status will yield such a benefit, but take the tentative position that enhanced service providers which believe they can so benefit probably should have the right to seek RPOA status.

37. What is certain, however, is that a grant of RPOA status does carry with it additional responsibilities. As we have noted, RPOAs are full participants in the work of the ITU. RPOAs are, thus, expected to commit corporate resources to the ITU, both in terms of staff input and of financial support. The ITU charges an initiation fee of $8,000 or more depending on the size of the company and the benefit it believes it can derive from membership. RPOAs are also required to make annual contributions toward covering the costs of the ITU. As a result, if an entity is going to benefit from RPOA status, it must expect to devote sufficient time and money. This burden is another reason we have taken the tentative position that RPOA status should be voluntary, and should not be entered into lightly by a company.

38. For the above reasons, we inquire: (1) whether RPOA status currently is available to enhanced service vendors under the Department of State's current practice; and (2) if not, whether a program opening the grant of RPOA status to the enhanced-service-provider category would be desirable. Recognizing that the Department of State ultimately will make determinations on RPOA status

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[20] We note that RPOA status is not absolutely required for a party to make its position known in the ITU working groups. For example, the ITU Convention also provides for a class of participation in ITU matters known as the Scientific or Industrial Organizations (SIOs). These are organizations which are more peripherally involved in communications matters but are permitted to participate in an advisory capacity. Unlike RPOAs, however, SIOs may not vote on behalf of their member country or chair study groups; but they are permitted to submit papers and other contributions to the CCITT study groups. Examples of companies who currently participate as SIOs are the television networks (ABC, CBS, NBC) and telecommunications equipment manufacturers. IBM also participates as an SIO. A complete listing of entities who have been designated formally as SIOs is included in Appendix 1 to this Notice. It is conceivable that enhanced-service providers could alternatively achieve sufficient participation through such arrangements.

we would like to put our tentative views out for public comment and to solicit the views of others upon our conclusions. We seek comment not only upon the merits of the RPOA concept and RPOA status, but also upon the issue of what entities should be accorded RPOA status and the way such status should be conferred.

39. Parties may wish to file comments on the following matters which have bearing upon the Department of State's RPOA designation practices: (1) the grounds, if any, for entertaining petitions to deny a request for RPOA status; (2) the type of entities eligible to apply for RPOA status (or to whom an obligatory process should apply); (3) the proper relationship between an RPOA accreditation process and our current Section 214 licensing program; (4) the need for each affiliated corporate subsidiary to secure a separate grant of RPOA status; and (5) whether and what kind of conditions should be attached to a grant of RPOA status. Our discussion of these issues raised in ADAPSO's petition, should not be taken as either endorsing or denying definitively any of ADAPSO's arguments. Rather, we have merely sought to initiate analysis of RPOA questions for purposes of eliciting the views of interested persons.[21]

40. A process under which RPOA status is relatively automatically granted could be beneficial. Since we regard the enhanced-service market as competitive, and beyond the scope of Title II regulation, we have made a policy determination to rely upon market forces to regulate the offering of such services. For similar reasons, an accreditation program which would require us or the Department of State to insert ourselves back into that market, or which requires us or the Department of State to classify providers as "data processing" or "telecommunications" might be most undesirable. Further, as we have noted above, the requirement of an entity to observe the obligations of Article 44 does not turn on that entity's willingness to assume those obligations. An entity, whether a common carrier or an enhanced-service provider, is bound to observe ITU regulations in any service which is capable of interfering with the lawful services of other ITU members. As a result, strong arguments in favor of relatively automatic grant of RPOA status are

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[21] We also seek comment on procedures for granting RPOA status. We note on this point that ADAPSO has suggested an accreditation program similar to our equipment-registration program (Part 68 of our Rules). That is enhanced-service providers would file for accreditation as an RPOA and indicate their willingness to assume the obligations of Article 44 of the ITU Convention. Although it indicates that it believes such accreditation should not be automatic, and that we should stand ready to revoke accreditation upon the entity's violation of its obligations, ADAPSO does not provide any specifics about its proposed procedures. It does indicate that its procedures would not constitute Title II licensing, and would not raise "any of the issues," in such a licensing, and that, as a consequence, RPOA status could probably be conferred after "a short notice and comment period." ADAPSO Petition at 18.

available. It may be sufficient that a grant be accompanied by the admonition that the entity is bound to observe ITU regulations.

41. Any such automatic grant procedure would not affect the responsibility of the United States to enforce its ITU obligations, or its ability to take corrective action, including revocation of the RPOA grant. We, thus, seek comment not only on the ADAPSO recommendation, but also upon our proposal preference for an automatic-grant procedure of RPOA status and any other viewpoints. Again, we do not seek to limit the scope of any person's comments on this or any other issue.

42. *Non-Carrier Access to Transmission Facilities*. In its petition ADAPSO asked for clarification of "ownership" with reference to our pro-competitive policies and for an inquiry into whether non-carrier ownership of IRUs in cable facilities is permissible. We find nothing in our *Computer II* policy which would require the term "own" to have anything other than its ordinary meaning. We do not address this issue further here.

43. Turning to ADAPSO's second request, the right of non-carriers to own IRUs in cable facilities,[22] we note that nothing in the Communications Act would *per se* prohibit the ownership of IRUs in cable circuits by enhanced-service providers or other non-common carriers.[23] In its petition ADAPSO did not elaborate upon its statement that we should decide the question of the right of enhanced-service providers to own their own facilities. As a result, we do not have the benefit of its views on the issue. ARINC, in its petition for declaratory ruling, raised a more general version of the question, the right of non-carriers to own IRUs in cable facilities, and

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[22] In its petition ADAPSO mentioned satellite circuits as well as cable circuits. Entities, even non-carrier entities, who lease satellite circuits under tariff from Comsat do not "own" those facilities. We note that we are examining a number of proposals for alternatives to current Comsat satellite ownership arangements in our Direct Access Inquiry, INTELSAT Satellite Facilities, 90 FCC 2d 1447 (1982). Thus, satellite IRUs are beyond the scope of this proceeding.

[23] Our *Computer II* decision stated that, as a matter of policy, the AT&T enhanced-service subsidiary would be barred from owning its own transmission facilities. *See* 77 FCC 2d at 466–75. That decision arose from AT&T's dominant position as an owner of facilities and our fear that AT&T could use those facilities to achieve an unfair competitive advantage in the competitive enhanced-services market. It did not proceed from a statutory prohibition. Similarly, in Authorized User Revisited, 90 FCC 2d at 421, n. 25; we found that Comsat would also be required to offer enhanced services through a subsidiary and would also be required to lease all facilities it used to provide enhanced services for the same policy reasons we required AT&T to do so. We note that we do not now require the IRCs to offer enhanced services through separate subsidiaries and have not forbidden them to acquire the facilities they use for enhanced services by tariff. In view of their relatively much smaller size we do not see the same need to require separation that we saw in the AT&T and Comsat cases. We note that we shall review that determination as part of our inquiry into international resale and shared use. International Telecommunications Competition, 77 FCC 2d 831 (1980).

provided some analysis. As a result, we shall discuss the ADAPSO request as part of our discussion of the ARINC request.

44. After reviewing the ARINC petition and the comments filed in connection with it, we conclude that none of those opposing ARINC's request has shown a legal impediment under the Communications Act to non-carrier ownership of cable IRUs. Rather, we believe such ownership is an open question and one of policy. We note at the outset that AT&T limited its comments primarily to an argument concerning its property rights in the TAT-7 cable. AT&T argues that the TAT-7 cable is the private property of its co-owners and that, as one of those owners, it retains its property rights therein, notwithstanding that the owners have devoted the property to common-carrier use. AT&T ties its arguments to the fact that circuits in the TAT-7 cable have been fully assigned and that the owners have committed their investments accordingly.

45. While there may be some merit in AT&T's argument concerning its already-constructed TAT-7 cable, we note that AT&T did not address the question of non-carrier ownership in cables which have not yet been fully assigned.[24] Whatever the merits of AT&T's property-law arguments with respect to TAT-7, they do not necessary apply to other cable facilities that have not yet been fully assigned. There, no one has made any investment which could arguably be adversely affected by a policy to allow non-carrier cable IRUs.

46. While the parties have discussed the legal issues at some length, they have not thoroughly addressed the policy issues. On our own motion, we have made a general policy analysis, detailed below, showing areas where we believe private ownership of IRUs is likely to yield policy benefits and areas of potential detriment. We shall thus include the question of private cable IRUs in this inquiry and request comment from interested persons on the policy issues we see and any other related policy issues which those filing comments deem important.

47. In *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), we upheld proposals by three domestic-satellite operators to sell transponders to users on a non-common-carrier basis. We concluded under the facts before us that private ownership of transponders would not harm the public interest in having transponders available for public use. Some of the facilities in question had not previously been authorized, and some were satellites which had been authorized initially for common-carrier service. We noted in reaching our decision that the Communications Act does not require domestic satellite service to be provided solely on a common-carrier

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[24] For example, the eighth transatlantic telephone cable (TAT-8) has been under discussion in Overseas Communications, 84 FCC 2d 760 (1981), and has been tentatively planned for introduction in 1988. However, the final design has not yet been selected and no contracts have been signed.

basis. We found that since "mixed" ownership is legally permissible, we are free to address questions of policy raised. We then found that such could benefit the public interest and would be authorized on a case-by-case basis.

48. While we have reached no conclusion that countervailing harms are outweighed, our preliminary analysis indicates that non-carrier ownership of cable IRUs appears likely to yield a number of public-interest benefits, including possible lower rates to users, more service flexibility and alternative financing sources for carriers. ARINC has asserted that non-carrier IRUs would increase competition for leased-channel services and put pressure on the charges for that service. A policy allowing non-carrier IRUs would appear likely to lower the communications cost of those entities electing to acquire IRUs. Such a policy would also appear likely to put pressure on international leased-channel rates of U.S. providers of leased-channel service. Current charges for a voice-grade leased channel between the United States and the United Kingdom are in the neighborhood of $10,000 per month, of which approximately $3700 is the U.S. IRC tariff charge and the balance is the charge imposed by the U.K. carrier. Using TAT-7 as an example, the capital cost of a circuit in the newest cable facility is approximately $55,000[25] (with additional periodic maintenance and operating charges). It would seem likely that some entities who can afford $10,000 per month for a leased channel, or $120,000 per year, would be able to raise $55,000 to acquire the IRU and to afford the associated maintenance costs. If there are such entities, other than ARINC, a policy of private IRUs would indeed seem likely to put pressure on leased-channel rates.

49. In view of such price differentials,[26] application of price pressure might be appropriate. However, one countervailing matter is noteworthy. ARINC has sought circuits only in the TAT-7, the probably even less expensive TAT-8 and the St. Thomas 3 cables—the lowest-cost cables in their respective ocean basins. ARINC and other users similarly situated can be expected to seek IRUs only in

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[25] Cable IRUs are sold among carriers at what is referred to as "net book cost"; that is, the initial capital cost per circuit less depreciation. Cables generally have a service life of approximately 24 years and depreciation is calculated on that basis. Since TAT-7 is new, having gone into service July 1, 1983, the figure quoted is its approximate, per-circuit, initial capital cost without any depreciation. The figure quoted is also for a whole circuit. It thus assumes that a private IRU holder would own the entire circuit, rather than follow the traditional pattern when cables are used for common-carrier services: joint ownership by the U.S. and foreign carriers (in which case the capital cost for each would be one half).

[26] This cost analysis is complicated by the fact that it is predicated upon TAT-7, the newest (and presumably lowest-cost) Atlantic facility. Leased-channel rates, however, are not predicated upon the costs of TAT-7 but, to some extent, upon a mix of old and new cable and satellite facilities. Some of the older cable facilities had initial per-circuit costs of several hundred thousand dollars and, even depreciated, are still more costly than circuits in TAT-7.

low-cost facilities. Any policy allowing private IRUs would have to be structured to assure that no deleterious effect would result upon the supply of low-cost cable circuits for common-carrier services.[27]

50. As we found analogously in *Above 890*, a policy of allowing non-carriers to acquire cable IRUs might be expected also to spur competition in specialized, international communications and information services. That has certainly been our experience with our *Above 890* policy domestically and we see no reason why private cable IRUs would not have that effect internationally as well. Allowing greater customer choice in this way could prompt international carriers to keep their service offerings flexible in response to customer needs.[28]

51. Another potential benefit of private cable IRUs might be to provide additional sources of financing for cable projects. In the past we have found it beneficial to widen the capital participation in such projects to reduce any one entity's outlay of funds and to place the costs of construction on those who will benefit from the facility. Extending participation beyond the current carriers to encompass non-carriers may reduce the capital cost of common carriers. Private cable IRUs would also help spread development risks among a larger group of venturers, assuring that all circuits will be fully used and guaranteeing the user that it will have capacity available to it.

52. Our analysis has also identified a number of potential drawbacks to a policy allowing non-carriers to acquire cable IRUs. These include problems of coordination and of retaining control of underlying facilities that are particularly complex in the international arena.

53. Spreading the ownership of cable facilities even more widely than at present will increase the problems of coordination among the

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[27] Some might argue that non-carrier cable IRUs are a form of "creamskimming," since no private owner would be likely to seek IRUs on routes where the cost of such IRUs exceed the carriers' tariffed leased-channel charges. If enough customers avail themselves of this policy, the argument goes, the carriers could suffer a significant loss of leased-channel revenues. This is, in fact, very much the same economic-impact question we considered in *Authorized User Revisited* (there the carriers argued that customers switching to Comsat circuits would idle cable circuits). Similarly, the argument fails here for very much the same reason we rejected it in *Authorized User Revisited*: the carriers can lower their charge to hold their customers and, to the extent their customers purchase private IRUS, the carriers can sell idled circuits and reduce their costs. If they elect not to sell the circuits, they would be free to switch some customers using satellite circuits to the idled cable circuits.

[28] While we recognize that, in the short run, priviate IRUs could allow users to lower their communications costs, this may not be true over time, at least for larger users. What is the low-cost cable today may not be so in later years. If future cables continue the pattern of gradually declining unit costs exhibited in the recent past, we would expect IRUs in those cables also to decline in cost. Purchase of an IRU would commit the buyer for up to 24 years (the current cable design life). For large users, with multiple circuits, the result could be a mix of facilities with varying unit costs not unlike those of carriers'.

co-owners and with foreign entities. Such a situation has, in the past, been alleged to increase the danger that facilities will not be efficiently used or that the owners may deadlock on needed actions. AT&T raised this point with respect to the proposal to allow the IRCs to acquire capital interest in AT&T's newer cables. (In its early cables AT&T was the sole owner and operator.) However, it was precisely to answer this kind of problem that the IRU was created—to divorce bare ownership from control, leaving AT&T to operate the cable. Thus, ownership of cable IRUs by non-carriers would seem to be more an extension of existing arrangements, rather than a substantial departure.[29]

54. The question of coordination with the overseas correspondents, however, could be of more consequence. ARINC's petition does not address how it proposes to operate circuits in which it might obtain IRUs. Current international arrangements for leased-channel service are predicated upon common-carrier service and the existence of a "customer"—*i.e.*, the same user at both ends of the circuit (as between two corporate affiliates). As such, they do not contemplate establishment of a leased channel between two or more unrelated entities. Private IRUs, as proposed by ARINC, would resemble current leased-channel service, but the fact of ownership rather than lease could alter the traditional common-carrier, customer arrangements. We have nothing before us which has been proposed as an alternative to the current arrangement. ADAPSO's petition did not address this point. ARINC's petition does not indicate with whom it proposes to operate a circuit should it be permitted to acquire one. ARINC does not indicate whether it now operates in any European country served by TAT-7 or whether it has an agreement with another entity to terminate such a circuit. ARINC does not even indicate whether it wishes to purchase an IRU in a whole or a half circuit.[30] We note that a non-carrier entity cannot operate with only a half circuit; it needs someone at the other end to terminate the circuits. If it alternatively proposes to acquire the whole circuit, it will need to establish an operating presence at

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[29] We also note that AT&T again raised this potential problem when we first proposed to grant the IRCs full ownership rather than IRUs. However, because cables are owned on a proportionate-share basis, and because AT&T uses roughly 85–90 per cent of international circuits for MTS service, AT&T still retains effective control of the cable. As we have noted, no one has raised the issue of non-carrier participation as joint owners and it is not specifically part of this proceeding. *See* f.n. 4, *supra*.

[30] Under the current international cable operating arrangements, communications are performed by two entities, one on either end of the circuit, operating jointly. The cable facilities used for such communications are also jointly owned, one-half by each such entity. Conventionally, each of those entities is said to hold a "half circuit" making up the through circuit. In most cases, this half ownership is analogous to tenancy in common under traditional property law in that the joint owners do not simply own separate halves. Rather, they each own undivided half interests in the whole circuit.

both ends. If, on the other hand, it proposes to acquire only a half circuit, it will need an arrangement with an entity, such as the PTT, at the other end.[31] We do not know how successful private entities will be in establishing necessary arrangements. We are aware that overseas administrations control the communications in their respective countries and that many perceive even leased channels as diverting revenues from the public telephone and telegraph networks. That being the case, some PTTs are likely to oppose the grant of private cable IRUs if they perceive such a course as representing a diversion of revenues.

55. It is important to highlight one of the most important aspects of international communications. Unlike domestic communications, where all entities operate within the United States and are subject to our jurisdiction, international communications are provided jointly by entities owned by or subject to the jurisdiction of sovereign nations. Because international communications are a cooperative venture, no one participant could, or would presume to, dictate policies to other sovereigns. We do not seek in this proceeding to redefine international communications or to alter the way international communications facilities are owned. We are, rather, looking solely at issues of United States communications and information policy. Further, our actions here are merely exploratory. We have not taken any decision on the matter of non-carrier IRUs and our inquiry here does not prejudge that issue. We shall take no unilateral actions, but shall confer with all those who are interested in the issues.

56. Finally, we note a philosophical/regulatory question which the proposal for private IRUs raises with respect to our *Computer II* policy. In developing that policy, we have sought to reassure concerned overseas entities that our policy relieving enhanced-service providers of Title II regulation will not have adverse consequences. One of the bases for this assurance has been that, to the extent enhanced-service providers are customers of basic communications carriers, we retain the power to regulate the underlying common-carrier services and facilities and, thus, have power to assure the smooth functioning of our policy. We have also relied upon this as a means to assure enhanced-service providers and their

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[31] We note that this is the same concern which arose in *Authorized User Revisited, supra.* Our policy to allow non-common carriers to acquire international satellite circuits directly from Comsat will require the acquiring entity to make some sort of arrangements with an overseas entity. ARINC also participated in our *Authorized User Revisited* proceeding, and acknowledged the need for such arrangements, but did not indicate that it had obtained any agreements. It merely indicated that such arrangements are the responsibility of those acquiring the circuits and the question need not complicate or delay the policy determination.

customers the reasonable and non-discriminatory availability of necessary basic communications services.

57. A policy allowing non-carrier IRUs would alter those current customer/carrier relations by opening a new class of ownership and operation. If enhanced-service providers avail themselves of such a policy they will be transformed from users to owners of facilities. While this might allow such service providers to reduce their costs, and presumably their charges to their customers, it might remove our control of the underlying basic services. As a result, any policy change we might adopt in this area must take these issues into consideration. We do not wish to adopt a policy which either ousts the Commission of necessary control, or which requires us to impose common-carrier regulation upon enhanced-service providers. On the other hand, we do not view this as necessarily interdicting a private-IRU policy. We note that we retain Title I jurisdiction over enhanced-service providers and that we have the power to assure their compliance with international standards independently of Title II regulation. We seek comment on this issue.

58. *DNICs*. We turn next to the question of assigning Data Network Identification Codes to non-carrier entities.[32] As we have noted above, a DNIC is a four-digit number which gives a "public data network"[33] discrete identification. The DNIC was developed in the CCITT to provide a uniform system of identifying such networks throughout the world. Responsibility for assigning DNICs rests with the various ITU Members in accordance with the overall numbering system. In the United States this responsibility lies with the Department of State, as U.S. representative in the ITU. Matters concerning DNICs fall within the purview of CCITT Study Group VII and issues concerning the assignment of DNICs within the United States fall under U.S. Study Group D, the group responsible for U.S. participation in Study Group VII. At present the Department of State has informally requested the Commission to assign DNICs. However, just as in the case of RPOA issue, the ultimate responsibility for U.S. DNIC matters is the Department of State. As a result, we shall present the results of our inquiry as a recommendation to the Department of State and shall keep it fully apprised of all comments filed with us on this issue.

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[32] The numbering plan for data networks (DNICs) is contained in CCITT Recommendation X.121 and is set forth in Volume VIII.3 of the CCITT "Yellow Book," International Telegraph and Telephone Consultative Committee, International Telecommunication Union, Yellow Book Vol. VIII, Fascicle VIII.3 pp. 245–256 (VIIth Plenary Assembly, Geneva November 10–21, 1980) (Geneva 1981). (hereafter cited as CCITT Yellow Book).

[33] A "public data network" is defined as "[a] network established and operated by an Administration for the specific purpose of providing data transmission services to the public. Circuit switched, packet switched and leased circuit data transmission services are feasible." CCITT Yellow Book, Vol. X, Fascicle X.1, p 189.

59. To date we have assigned DNICs to a total of 33 networks.[34] Traditionally, those obtaining DNICs have been certificated common carriers and the networks for which the code was sought have been what are regarded as traditional common-carrier ("basic") services: telex, datel, facsimile and leased-channel services. However, on at least one occasion, we have granted a DNIC to an entity, Compuserv, which provides a service which would be classed as an "enhanced service" under our *Computer II* policy. We also have pending requests from other enhanced-service providers.

60. The primary purpose of the DNIC is to allow overseas customers or carriers to route traffic to a particular data network. The first three digits of the DNIC constitute the Data Country Code (DCC) which identifies the country or geographical area in which the network to be identified is located.[35] The first digit indicates the region as numbered by the CCITT (the United States is in Region 3) and the next two digits identify countries within the region. The fourth digit is known as the network identifier which indicates a particular network within the country identified by the DCC.

61. A total of 600 three digit DCCs (from 200 to 799)[36] are available for distribution to the entire world. Because a DNIC is composed of a DCC plus a fourth digit, there are theoretically 10 possible DNICs which can be constructed from each DCC and, thus, a maximum total of 6000 DNICs. *See CCITT Recommendation* X.121, CCITT Yellow Book, Volume VIII, 3, p. 247. The assignment of the fourth digit (and, hence, of the discrete DNIC) is the responsibility of the individual countries. The CCITT has allocated the United States (*i.e.*, the 50 states and the District of Columbia) seven DCCs (310 through 316), Puerto Rico the DCC 330, the Virgin Islands the DCC 332, Guam the DCC 525 and American Samoa the DCC 544. *See* CCITT Recommendation X.121, Annex B. The DCCs between the ones assigned for use on the mainland and that for Puerto Rico (*i.e.*, the numbers 317 through 329, inclusive) have not been assigned to anyone. Assuming that all 13 could be assigned for U.S. use, we would have a maximum of 20 DCCs and, thus, could assign a maximum of 200 DNICs.[37]

62. The DNIC is intended to identify a destination public data network and is used as part of an international data number.[38] The DNIC is not intended for use in selecting among several internation-

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[34] A complete listing of entities who have been assigned DNICs is attached as Appendix 2 to this Notice.

[35] *See* CCITT Recommendation X.121, CCITT Yellow Book, Vol. VIII.3, p. 246.

[36] The digits 0 and 1 have been reserved and the digits 8 and 9 are used to connect public data networks to the international telex and telephone networks, respectively. *See Id.* at p. 247.

[37] The Department of State has notified the CCITT that the United States may need additional DCCs.

[38] An international data number is defined as the DNIC plus a Network Terminal Number, or as the DCC plus a National Number. CCITT Recommendation X.121,

al carriers where the destination network does not operate its own international lines, and must rely upon those of another carrier, or where more than one carrier provides access to a given destination network. That function is performed by a prefix code which is separate from the international data number. CCITT Recommendation X.121, Paragraph 2, Section 5. That prefix varies from country to country and its assignment is a matter for local determination.[39] Similarly, the decision whether or not to allow the customer to select one of multiple carriers serving an overseas destination point is a matter of local choice. Most countries do not allow customer choice; rather, the originating carrier or administration makes the selection. The United States, however, does allow customer selection. Where the customer can choose, the choice is indicated by the customer's including the overseas carrier's DNIC in the facilities selection portion of the call request.

63. The DNIC, as originally conceived, was intended for use with international communications. However, because the DNIC permits automatic switching directly to a particular network, assignment of a DNIC would obviously simplify any networks provision of an international service, whether or not it maintains its own overseas lines. The Western Union Telegraph Co., for example, until recently was barred from overseas operations. Western Union, however, has originated and terminated substantial amounts of international traffic and has been assigned a DNIC. It also may be that a DNIC would be useful as an identification code even for domestic networks which do not originate or terminate international traffic. On the other hand, it does not, however, appear that the absence of a DNIC would make it impossible in every case for a given U.S. entity to operate internationally or to receive inbound calls. With appropriate interconnection arrangements a U.S. service provider may be able to rely for its traffic handling upon the carrier providing the overseas link and that carrier's DNIC. However, reliance upon such arrangements would likely make operation of a network more difficult.

64. In assigning DNICs we have not heretofore developed any formal policy regarding the entities or services which should be assigned DNICs or any formal procedures. An entity desiring such a code merely notifies the Commission that it wishes one assigned and states that it has the ability to originate and terminate international

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CCITT Yellow Book, Vol. VIII.3, page 248. A "National Number consists of the fourth or network digit described in para. 56, *supra*, plus the network terminal number. *Id.*

[39] Where there are multiple carriers serving a country, the selection of the particular carrier to handle a particular call is performed by a portion of the "selection signals," which is known as the "facilities request portion." *Id.* at 246. The CCITT Recommendations define "selection signals" as "[t]he sequence of characters which indicates all the information to establish a call. The Section signals consist of two elements: the facilities request and the address. The facilities request always proceeds the address." CCITT Yellow Book, Vol. X.1, p. 212.

traffic. In the past this showing has taken the form of an entity's providing evidence that it has received a Section 214 certification and has concluded an operating agreement with a foreign carrier. Another form of showing is an interconnection arrangement with a U.S. international carrier.

65. While these have been workable arrangements in the earlier, more static environment, they may not suffice in the future. We expect that the number of U.S. international service providers will increase. Additionally, enhanced service providers are generally customers of telecommunications carriers rather than being carriers themselves, and, as such, do not obtain Section-214 authorization. Neither do they always obtain interconnection arrangements or overseas operating agreements, in the traditional sense. We thus believe that we should develop a new way of deciding the question.[40]

66. One method might be simply to assign a DNIC to anyone who requests one, with no inquiry about the type of service involved or ability to actually provide service. That would certainly be consistent with our policy to facilitate the entry of new service providers. In order to insure, however, that the Commission's goals in international communications are met, some additional framework may be necessary.

67. One such framework would be to tie the issuance of a DNIC to a grant of RPOA status. Such an automatic approach would also simplify the assignment procedure. However, there appears to be no necessary conceptual connection between RPOA status and the need for a DNIC. If we adopt a liberal approach to designation of RPOAs, a policy of automatic DNIC assignment might also raise the scarcity problem—although the fact that RPOA status imposes financial obligations would tend to limit the number of those applying for such status. More fundamentally, however, as we concluded above in our discussion of RPOAs, we see no reason to require an entity to become an RPOA if it does not seek this status. It seems likely that a number of entities might find a DNIC to be of more immediate practical importance than RPOA status; we would not wish to force them into becoming an RPOA merely to receive a DNIC.

68. In light of the potential growth in the number of data

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[40] We note that the DNIC is not the only network identifier code developed in the CCITT. For example, CCITT Recommendation F.68 establishes a system for the identification throughout the world of telex networks and their customers, and Recommendation F. 69 sets forth the formal "telex destination code" assignment provisions. No one has raised a question concerning the need for new policies regarding U.S. assignment of the so-called F.69 codes and they have not been included in the issues in this Notice. If those filing comments in this proceeding are of the opinion that F.69 codes should be included, they should address that proposal in their comments. There may be other CCITT numbering codes which are relevant. Those commenting should also feel free to raise those as well.

networks under our deregulatory program, we believe we should review the procedures for assigning DNICs.[41] It is possible that in the long run technology will solve the potential problem of scarcity, through a five-digit DNIC or some other means. In the near term, however, we must assume that scarcity may at some point be a problem and develop a way to assure that everyone who can benefit from assignment of a DNIC can receive one or, failing that, that available DNICs go to those who can best use them. One way we might seek to achieve our goal is through developing criteria on which to base the issuance of a DNIC. That is, we may need to develop a formal process for considering requests for a DNIC and how to decide who may receive one. Such a process may also need to include procedures for revoking a DNIC should it later appear an entity holding a DNIC cannot make use of it or that some other entity can make better use of it.

69. We recognize that formal procedures of this nature can be cumbersome and that the public may benefit from adoption of a different process which minimizes Commission involvement. It is, for example, possible that the marketplace can be relied upon to allocate DNICs. This could be achieved in at least three ways: through lottery, through auction (if the Commission obtains necessary legislative authority) or through assignment of DNICs on a first-come-first-served basis until the supply is exhausted. Reliance on market forces to determine DNIC assignment requires that the DNIC be freely transferable. If an entity who was assigned a DNIC had no use for it, that entity could transfer it to another entity who could use it. Such a transfer need not involve the Commission (except for notification purposes) but could take place among the parties.

70. We invite comment from interested persons on all aspects of the DNIC issue. We particularly seek comment on the alternatives of a formal DNIC-assignment process as well as the market approach and their relative merits. We also seek comment about whether complementary national arrangements may be substituted for the international system of DNICs to cover those service providers who do not operate internationally.

CONCLUSION

71. Each of the matters we have included in this Notice is important in itself and for its potential impact upon the implementation of our pro-competitive international policies. The issues raised may be interrelated, to some extent. For example, suggestions have been made that we formally i.e. the issuance of DNICs to a grant of RPOA status. On the other hand, some entities who have requested

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[41] The DNIC numbering system can be revised only as a result of the World Plan Committee. For this reason, and because the number of DCCs available throughout the world is limited, it is not clear whether the United States could obtain an additional supply of DNICs.

assignment of a DNIC have not requested RPOA status. Since we are concerned with the overall solutions to the issues raised, we specifically request comments on possible interrelations of these issues.

72. We also note that this proceeding is an inquiry designed to elicit information on a comprehensive basis. Although we have included analysis of the pleadings and other matters already before us, and have expressed some tentative reactions to the arguments raised, we emphasize that we have not yet reached a decision on these matters. Our analysis is intended to give focus to the issues and to show areas where we would particularly like to receive further comment; and is not intended to foreclose any relevant arguments or to channel response is a pre-conceived direction. Upon receipt of the comments herein we shall analyze them and take appropriate further action, including institution of formal rulemaking proceedings or preparation of reports, as appropriate. Those filing comments in this inquiry are not bound by only the issues we have included in this Notice, but are free to raise other relevant matters or considerations they believe are essential to resolution of the RPOA, IRU and DNIC matters. We shall also provide for the filing of reply comments.

73. Again we wish to make clear that we are not in this proceeding seeking unilaterally to redefine or alter the CCITT system of RPOAs and DNICs. Rather, we are seeking only to find ways we can apply the international RPOA and DNIC system within the United States to achieve our overall communications goals. Our actions here are preliminary and will not affect the rights of any sovereign administration.

74. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201–205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201–205, 214 and 403 (1976), that an inquiry into the above-captioned matters is hereby INSTITUTED.

75. IT IS FURTHER ORDERED that Comments and Reply Comments shall be filed in accordance with the following schedule:

Comments shall be filed on or before March 5, 1984;

Reply comments shall be filed on or before April 2, 1984.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX 1

U.S. Membership in the CCITT by Recognized Private Operating Agencies and by Scientific or Industrial Organizations

Recognized Private Operating Agencies

1. Aeronautical Radio, Inc.
2. American Satellite Corp.
3. American Telephone and Telegraph Co.
4. Communications Satellite Corp.
5. FTC Communications, Inc.
6. Graphnet, Inc.
7. GTE Service Corp.
8. GTE Telenet Communications Corp.
9. Hawaiian Telephone Co.
10. ITT World Communications Inc.
11. RCA American Communications, Inc
12. RCA Corporation
13. RCA Global Communications, Inc.
14. Satellite Business Systems
15. TRT Telecommunications Corp.
16. Tymeshare Corp.
17. Western Union International, Inc.
18. The Western Union Telegraph Co.

Scientific or Industrial Organizations

1. Antiope Videotex Systems, Inc.
2. Arthur D. Little, Inc.
3. Burroughs Corp.
4. Codex Corp.
5. Compass Communications Corp.
6. Control Data
7. Databit, Inc.
8. Extel Corp.
9. Exxon Enterprises
10. General Cable International, Inc.
11. General Datacomm Industries
12. General Electric Information Services
13. GTE International, Inc.
14. Harris Corp.
15. Hewlett-Packard
16. Honeywell, Inc.
17. Hughes Aircraft Co.
18. International Business Machines Corp.
19. International Telephone and Telegraph Corp.
20. Intertel, Inc.
21. MICOM Systems, Inc.
22. Minnesota Mining and Mfg. Co.
23. Ormat Systems, Inc.
24. Paradyne Corp.
25. Planatronics, Inc.
26. Racal-Milgo, Inc.
27. Racal-Vladic, Inc.
28. Rapicon, Inc.
29. Raychem Corp.
30. Rixon, Inc.
31. Rockwell International Corp.
32. Stromberg-Carlson
33. Timplex, Inc.
34. Tran Telecommunications, Inc.
35. Universal Data Systems, Inc.
36. United Telecommunications, Inc.
37. Wang Labs
38. Xerox Corp.

APPENDIX 2

Data Network Identification Code (DNIC)

3101 - Western Union Digital Data Service
3102 - WUI Digital Datel Network
3103 - ITT UDST Network
3104 - WUI Database Access Network
3105 - WUI Leased Channel Network
3106 - Tymnet Public Data Network
3107 - ITT Datel Network
3108 - ITT Short Term Voice/Data Transmission Network
3109 - RCAG DATEL II

3110 - Telenet Public Packet Network
3111 - RCAG DATEL I (Switched Alternate Voice-Data Service)
3112 - Western Union Broadband Exchange Network
3113 - RCAG Remote Global Computer Access Service (Low Speed)
3114 - Western Union Infomaster Service
3115 - Graphnet Interactive Network
3116 - Graphnet Store and Forward Network
3117 - WUI Telex Network
3118 - Graphnet Facsimile Network
3119 - TRT Packet Switching Network
3120 - ITT Low Speed Network
3121 - FTCC DATEL
3122 - FTCC Telex
3123 - FTCC Leased Channel
3124 - FTCC Packet Switched Transmission Service (PST Service)
3125 - ITT Network Service Service of Uninet, Inc.
3126 - ADP Autonet
3127 GTE Telenet
3128 - TRT Telex Network
3129 - TRT Leased Channel Network
3130 - TRT Digital Data Network
3131 - RCAG Telex
3132 - Compuserv
3133 - RCAG XNET Service

Educational Noncommercial Broadcast Service
Low Power Television
Translators

Commission denied Petition for Further Reconsideration of the low power television *Report and Order*, 47 F.R. 21488, that requested reinstatement of priority formerly accorded to noncommercial rebroadcasts over translators operating on channels reserved for full service noncommercial stations.

-Low Power Television Service
BC Docket No. 78-253

FCC 83–486

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System	BC Docket No. 78-253 RM-2846 RM-3109

MEMORANDUM OPINION AND ORDER

(Adopted: October 19, 1983; Released: October 27, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT; COMMISSIONER DAWSON NOT PARTICIPATING.

1. On May 6, 1983, the Commission issued a *Memorandum Opinion and Order*[1] in this proceeding in response to several petitions seeking reconsideration and clarification of the *Report and Order*[2] authorizing the low power television service. The Commission now has before it a "Petition for Further Reconsideration" in this matter filed by the National Association of Public Television Stations ("NAPTS"). Comments in opposition to this petition have been filed by the Spanish International Communications Corporation ("SICC"), and NAPTS has responded to these comments.

2. NAPTS seeks reconsideration of that aspect of the *Report and Order* and the *Memorandum Opinion and Order* that eliminated the absolute priority previously accorded noncommercial rebroadcasts via translators on channels reserved in the Table of Television

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[1] FCC 83-129, 48 Fed. Reg. 21478 (May 12, 1983).

[2] FCC 82-107, 47 Fed. Reg. 21468 (May 18, 1982).

Assignments for full service noncommercial broadcasters. NAPTS contends that the Commission "misunderstood" its original request for reconsideration of the *Report and Order* and "denied its request as a result of that misunderstanding." In this respect, petitioner points out that the Commission incorrectly characterized NAPTS" position as requesting an "interference priority" for noncommercial translators, while it actually sought reinstitution of the absolute priority formerly granted noncommercial rebroadcasts over translator facilities. Accordingly, NAPTS reasserts the arguments it advanced in its initial petition for reconsideration concerning the noncommercial priority issue and asks us to reexamine them.

3. While we agree that our description of NAPTS' original request for reconsideration may not have been entirely accurate, we also conclude that NAPTS' substantive concerns in this matter were fully considered in our low power television proceedings and that, as a result, petitioner has suffered no prejudice from our misdescription of its position. Nonetheless, in order to dispel any possible confusion concerning our decision, we shall restate our understanding of NAPTS' position and our reasoning with respect to the noncommercial priority question.

4. NAPTS argues that our elimination of the priority accorded translator rebroadcasts of noncommercial programming seriously impairs the ability of noncommercial television to extend its services to remote areas of the country. In this regard, NAPTS points out that the objective of expanding the availability of public broadcasting has been specifically mandated by Congress. Further, it contends that, in view of the substantial reductions in federal funding recently suffered by the public broadcasting sector, inexpensive translators offer the most feasible means of achieving this objective. Absent a noncommercial priority, NAPTS fears that the high commercial demand for low power facilities will result in too little translator capacity being available for noncommercial purposes.

5. We are well aware of the Congressional interest in expanding public broadcasting and have long acknowledged the public interest benefit in promoting noncommercial services through our full service channel reservation policies. Our decision in the *Report and Order* to abolish the noncommercial translator preference, to which NAPTS objects, was not based on any rejection of this concept. Rather, we determined that the potential success of the low power television service depended largely on affording licensees maximum flexibility to respond to market demands, including the ability to freely determine whether to operate in a commercial or noncommercial mode. Accordingly, we permitted all low power licensees to utilize advertising as a means of supporting their operations, regardless of the nature of the programming being provided and regardless of the for-profit or not-for profit nature of the licensee. Having made this choice, based on our reasonable estimate of the

nature of the low power television service, we concluded that the commercial-noncommercial distinction inherent in the priority for noncommercial rebroadcasts via translators was inappropriate and should be deleted. We continue to believe this choice was both well founded and properly explained in the *Report and Order*.[3]

6. Further, having again reviewed NAPTS' contentions, we are not persuaded that there is a substantial risk of spectrum shortages which will curtail expansion of public television service to remote and underserved areas of the country. We note in this regard that public television already reaches at least 90% of American households and 98% of households with television sets.[4] There are 292 noncommercial stations licensed nationwide on reserved channels and an additional thirty stations have outstanding construction permits or have applications pending before the Commission. Despite this coverage, there remain 386 vacant channels reserved for noncommercial television, many of which are assigned to communities in remote areas. Moreover, because full service noncommercial stations continue to enjoy an absolute priority to utilize these reserved channels, low power applicants have an incentive to avoid selecting these channels whenever possible.

7. Additionally, while we recognize that full service stations incur greater costs and are subject to broader regulatory obligations than translators or low power stations, these differences are considerably attenuated in the noncommercial area. For example, full service noncommercial stations do not labor under a local programming obligation or a minimum operating hours requirement. Moreover, the mimimum power requirements for such stations are actually below the maximum power limitations for low power stations. Thus, activation of a minimal full service noncommercial station, with its attendant channel reservation rights, would appear a feasible solution in those seemingly improbable cases where intense commercial low power demand in remote areas precludes translator-based extension of needed noncommercial service.

8. In sum, we believe our initial decision to eliminate the former priority for noncommercial rebroadcasts via translators operating on reserved channels reflected an informed judgment concerning the needs of the low power service. We do not agree with NAPTS that our decision poses an appreciable threat to the expansion of noncommercial television service in remote areas, nor do we believe we have acted in this matter without providing a reasoned basis for our choices.

9. Accordingly, IT IS ORDERED, That the "Petition for Further

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[3] *See Report and Order*, *supra* at paras. 77-78.

[4] Status Report of Public Broadcasting 1980, Corporation for Public Broadcasting.

Reconsideration" filed in this proceeding by the National Association of Public Television Stations IS DENIED.

10. Authority for this action is contained in Section 303 of the Communications Act of 1934, as amended, and Section 1.429 of the Commission's Rules.

11. For further information concerning this proceeding, contact Maureen Ryan Beaty, Mass Media Bureau, (202) 632–7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Construction Permit, Transfer of Reimbursement of Expenses

Application for review denied. Recovery of fair market rental value of property leased to assignee of construction permit is not inconsistent with Section 73.3597(c)(2) of Rules. Such a sublease does not constitute a retained interest in the station in violation of Section 73.3597(d). Legal fees incurred in opposing petitions to deny are reimbursable under Section 73.3597(c)(2).
–Lub TV Associates, LTD.

FCC 83–519

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of LUB TELEVISION ASSOCIATES, LTD. d/b/a LA UNIDAD BROADCASTING CORPORATION (Assignor) and CENTENNIAL BROADCASTING CORPORATION (Assignee) For the Assignment of Construction Permit for Station KTMX-TV, Channel 31, Denver, Colorado.	File No. BAPCT-811124KJ

MEMORANDUM OPINION AND ORDER

(Adopted: November 8, 1983; Released: November 17, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it an application for review, filed on February 28, 1983, by Spanish International Communications Corporation and Dr. Caroline B. Mitchell (hereinafter referred to collectively as SICC). The petition seeks review of an action by the Mass Media Bureau, granting a request by LUB Television Associates Ltd., d/b/a La Unidad Broadcasting Corporation (LUB), for further reimbursement of expenses in conjunction with the above-captioned assignment application. An opposition was submitted by LUB, and a reply was thereafter filed by SICC.

2. On September 15, 1982, the Broadcast Bureau granted, pursuant to delegated authority, the application for the assignment of the permit to construct station KTMX-TV, channel 31, Denver,

Colorado, from LUB to Centennial Broadcasting Corporation (Centennial).[1] This grant was subject to the condition that the total consideration paid to LUB not exceed $155,262, plus an additional amount representing the fair market rental value of any property leased by LUB to Centennial. The Bureau determined that LUB was entitled to receive this amount under Section 73.3597(c)(2) of the Commission's Rules, which provides that payments for the assignment of a permit to construct a radio or television station shall be limited to legitimate and prudent expenses for "preparing, filing, and advocating the grant of the construction permit, and for other steps reasonably necessary toward placing the station in operation." The Bureau also denied two petitions to deny this assignment application, one of which was filed by SICC.[2]

3. Subsequently, on October 25, 1982, LUB filed a request for approval of further reimbursement. LUB claimed that it had only been reimbursed for expenses incurred up to September 22, 1981, the date on which the agreement for assignment of the construction permit was signed. LUB stated that it should also be reimbursed for reasonable and prudent expenses which were incurred between that signing and the agreement's consummation on October 15, 1982. This request was also opposed by SICC. However, in a letter of January 28, 1983, the Mass Media Bureau granted LUB's request for further reimbursement in the amount of $177,562. The Bureau found that, pursuant to Section 73.3597 of the Rules, this sum represented additional legitimate and prudent expenses incurred in attempting to make the station operational.

4. In its application for review, SICC now contends that the Bureau erred in granting LUB's request for further reimbursement. SICC alleges that LUB is improperly profiting through a sublease arrangement in violation of Section 73.3597 of the Commission's Rules. SICC also believes that LUB should not be reimbursed for attorney's fees incurred in opposing petitions to deny its assignment application. These issues and other matters are discussed below.

Procedural Matters

5. LUB asserts that SICC's application for review should be dismissed as an untimely attempt at seeking reconsideration of the Broadcast Bureau's action of September 15, 1982, which denied SICC's petition to deny the assignment application. Since SICC did

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[1] Both LUB and Centennial consummated this transaction on October 15, 1982. Thereafter, the call letters for station KTMX-TV, Denver, Colorado, were changed to KDVR(TV), effective March 20, 1983. However, for ease of reference, the former call letters, KTMX-TV, have been used throughout this document.

[2] SICC operates a television translator station on channel 31, Denver, Colorado, which will be replaced by the television station being built under the construction permit assigned by LUB to Centennial. Dr. Caroline Mitchell is a regular viewer of SICC's translator station.

not file a petition for reconsideration of that action, LUB believes that SICC should be foreclosed from rearguing those issues at this time. We find, however, that it is appropriate to consider SICC's application for review on the merits. Although SICC did not file a petition for reconsideration of the original staff action in this proceeding, it did raise its objections in the context of opposing LUB's request for further reimbursement. Since these matters were considered by the Bureau in its action of January 18, 1983, we conclude that they are properly the subject of an application for review.[3]

Sublease Arrangement

6. In its application for review, SICC alleges that the Bureau erred in permitting LUB to receive the fair market rental value of any property leased to Centennial. SICC asserts that, regardless of whether the sublease represents the fair market rental value of the property, LUB is realizing a substantial profit and is thus circumventing the purpose of Sections 73.3597(c) and (d) of the Commission's Rules. In support of this position, SICC points out that LUB is currently leasing office and studio space for $2,616 per month and is subleasing this same space to Centennial at rates that increase from $7,550 per month in the first year to $16,107 in the fifth year. SICC contends that, under this arrangement, LUB will realize a profit of approximately $290,000. Additionally, SICC questions whether the sublease represents the fair market rental value of the property. In this regard, SICC states that, under the sublease, the rental fees increase at an average annual rate of 21% whereas a real estate appraisal submitted by LUB indicates that an 8% annual increase in rent would be appropriate for this market.

7. In its opposition, LUB states that the Bureau properly approved the sublease arrangement as an arm's length business transaction. LUB notes that it submitted several appraisals of the property, which established the fair market rental value at $10 to $11 per square foot. LUB points out that SICC never submitted any expert evidence questioning these appraisals. Furthermore, to rebut SICC's contention that the rental fees under the sublease increase at an unreasonable rate, LUB submitted an affidavit from one of its principals who participated in the sublease negotiations. This affiant states that the rental formula was predicated on having initial lower lease rates while the station was in its early years of operation and higher rates in later years after the station had become established.

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[3] LUB also requests that SICC's reply be striken as an unauthorized pleading pursuant to Section 1.115(f) of the Commission's Rules. This section provides that, in proceedings involving applications for review, reply pleadings shall be filed only if requested by the Commission. However, we will consider this pleading because it aids in our disposition of this case and because none of the parties will be prejudiced by this action.

Consequently, LUB states that the rental rates of $7.50 and $9.50 per square foot in the first two years of the sublease are actually below the market value established by the appraisers. Finally, LUB contends that, over the five-year term of the sublease, the total rental fees are less than the payments would be under a formula suggested by an appraiser and referred to by SICC. LUB explains that this result follows from the fact that this other formula does not include a discounted rental rate in the first two years.

8. We find that the Bureau's action permitting LUB to recover the fair market rental value of any property leased to Centennial is consistent with Sections 73.3597(c) and (d) of the Commission's Rules. As stated above, subsection (c) limits the payments for such permits to legitimate and prudent expenses in obtaining the construction permit and attempting to place the station in operation. Additionally, subsection (d) provides that, if an assignor retains an equity interest in the station or any other benefit, a question is raised as to whether the transaction involves gain to the seller over and above its legitimate out-of-pocket expenses. A hearing is then required unless the assignor with the retained interest meets certain requirements for contributing capital to the station in proportion to its equity interest.[4]

9. In adopting the above rules, the Commission was concerned with assignors profiting by retaining equity or future interests in unbuilt stations. *See*, *Notice of Proposed Rule Making* in Docket No. 18305, 33 Fed. Reg. 12678 (1968); and *Report and Order* in Docket No. 18305, 16 FCC 2d 789 (1969). However, we do not believe that an arm's length sublease of property constitutes a retained interest in an unbuilt station. Rather, such leases or sales of real property have been approved by the Commission in the past, provided that the rental fees or sales prices were at fair market rates. *See, e.g.*, *Butte Broadcasting Co., Inc.*, 38 R.R. 2d 1351, 1352 (1976); and *Trend Radio, Inc.*, 9 R.R. 2d 547, 548 (Rev. Bd. 1967).[5] In this regard, LUB

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[4] It should be noted that, in the assignment application as originally submitted, LUB had requested a waiver of Section 73.3597 (d) of the Commission's Rules because LUB was to receive an option for stock in Centennial as consideration for assignment of its construction permit. However, this waiver request became moot as the result of an amendment of May 28, 1982, in which LUB relinquished this stock option. In its place, LUB obtained an outright 20% interest in Centennial's stock in return for a capital contribution of $30,000. The Bureau found, in its action of September 15, 1982, that this arrangement complies with Section 73.3597 (d) of the Rules because LUB contributed capital and made loan guarantees that were proportionate to its 20% equity interest in the assignee.

[5] Both of these cases involved "buy-out" agreements under which one of two mutually exclusive applicants for a construction permit for a new broadcast station agreed to withdraw its application in exchange for the payment of expenses incurred in seeking the construction permit. We also note that Section 311 (c) of the Communications Act and Section 73.3525 of the Commission's Rules were recently amended so that payments made in connection with buy-out agreements are no longer limited to legitimate and prudent expenses incurred in

has submitted several appraisals establishing the fair market rental value of the property and has provided a reasonable explanation for the escalation of the rental rates over the five-year term of the sublease. SICC, on the other hand, has not submitted any evidence to rebut these appraisals and is merely speculating that the sublease does not reflect the property's fair market rental value. Under these circumstances, we conclude that approval of the sublease will not result in excessive consideration in violation of Sections 73.3597(c) and (d) of the Commission's Rules.

Reimbursement of Legal Expenses

10. SICC next contends that the Bureau erred in permitting LUB to be reimbursed for legal expenses incurred in opposing petitions to deny its assignment application. The Bureau found that these expenses were reimbursable because the petitions raised questions concerning LUB's basic qualifications, which could have resulted in loss of its construction permit. However, SICC believes that, regardless of whether basic qualifications matters were raised, these legal expenses were directly related to prosecution of LUB's assignment application and are thus not reimbursable under Section 73.3597 (c) of the Commission's Rules. Furthermore, SICC claims that reimbursement for all of these legal expenses is not proper because the petitions raised issues other than LUB's basic qualifications as a permittee.

11. We recognize that legal expenses related to prosecution of an application for the assignment of a construction permit for an unbuilt station are not ordinarily reimbursable under Section 73.3597 (c) of the Commission's Rules because such expenses are not for "preparing, filing, and advocating the grant of the construction permit, and for other steps reasonable necessary toward placing the station in operation." This policy derives from cases involving Commission approval of "buy-out" agreements between competing applicants for new broadcast stations. In those cases, the Commission held that expenses incurred in the preparation of an agreement looking toward dismissal of an application were not reimbursable because they did not involve "advocating the grant of the construction permit." *See, e.g., Keith L. Reising*, 8 R.R. 2d 211, 214 (Rev. Bd. 1966). Pursuant to these policies, the Bureau properly denied reimbursement for legal expenses totalling $10,643 because the expenses directly related to LUB's prosecution of the assignment application. Nevertheless, we find that the expenses incurred in

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preparing, filing, and advocating the grant of the application. Nevertheless, we find that the cases cited above are relevant because, in adopting Section 73.3597 (c) of the Rules, the Commission intentionally used the "legitimate and prudent expense standard" of Section 311 (c) of the Communications Act. *See, Notice of Proposed Rule Making* in Docket No. 18305, 33 Fed. Reg. 12678 (1968).

opposing petitions to deny are reimbursable because these petitions went beyond seeking denial of the assignment application. Rather, these petitions sought to raise questions concerning LUB's basic qualifications by accusing LUB of making significant misrepresentations to the Commission. Since such allegations could have resulted in the loss of the construction permit, we believe that the expenses incurred in opposing these allegations are legitimate and prudent expenses under Section 73.3597 (c) of the Commission's Rules.[6] Furthermore, even though the petitions raised other issues, we believe that the legal fees are still recoverable because LUB was also defending its basic broadcast qualifications.

Lack of Candor

12. As a final matter, SICC believes that LUB has made two conflicting statements to the Commission that raise a lack of candor issue. First, LUB stated in its assignment application that it was assigning its construction permit because it was unable to obtain financing to put the station on the air. Thereafter, in connection with its request for approval of further reimbursement, John Quintana, President of LUB, stated in an affidavit that, if the Commission had not approved the application, "LUB would have continued to seek financing and, upon securing financing, would have constructed the station." SICC contends that these conflicting statements raise a question concerning LUB's real reason for selling the station. However, we do not believe that a lack of candor issue is warranted. Rather, we are of the view that the Bureau properly resolved this issue by concluding that Mr. Quintana's statement merely evidences an intent by LUB to continue to search for financing if its assignment application were not approved. Moreover, in the absence of any other evidence by SICC, we cannot infer an intent by LUB to deceive the Commission as to its reasons for this transaction.

13. Accordingly, IT IS ORDERED, That the application for review filed by Spanish International Communications Corporation and Dr. Caroline B. Mitchell IS DENIED.

14. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send by *Certified Mail - Return Receipt Requested*, a copy of

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[6] We are guided by the fact that certain expenses that do not fit squarely into the categories of "preparing, filing, or advocating the grant of the construction permit" have nevertheless been found to be reimbursable in approving "buy-out" agreements between competing applicants for new broadcast stations. For example, in *KLRA, Inc.*, 10 R.R. 2d 132 (Rev. Bd. 1967), reimbursement was allowed for expenses incurred in obtaining legal advice on the relative merits of prosecuting or dismissing an application for a new station. The Review Board held that such expenses were not "so unrelated to preparing, filing, and advocating the grant of an application as to be excluded under Section 311 (c) of the Communications Act." *Id.* at 133.

this Memorandum Opinion and Order to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Candor
Construction Period
Misrepresentation, Character Qualifications
Renewal of License, Denied or Dismissed
Reports, Fraudulent

Review Board denied renewal of mobile telephone license and related application where applicant, a sole proprietor, deliberately and continually lied in license application, yearly reports and correspondence. Other renewal applications are returned to Common Carrier Bureau for independent consideration.
-Mobilfone Communications
CC Docket No. 82-15

FCC 83R–88

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS For renewal of license of Station KLB500 authorized to operate on 152.03 MHz, 152.09 MHz, 152.18 MHz, 152.21 MHz, 454.025 MHz, 454.125 MHz, 454.200 MHz, and 454.300 MHz, in the Domestic Public Land Mobile Radio Service at Little Rock, Arkansas	CC Docket No. 82–15 File No. 23697-CD-R-79
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS For renewal of license of Station KQZ752 on 152.24 MHz and 158.70 MHz in the Domestic Public Land Mobile Radio Service at Little Rock, Arkansas	CC Docket No. 82–16 File No. 23700-CD-R-79
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS	CC Docket No. 82–17 File No. 20741-CD-P-(2)-78

For Construction Permit to relocate
454.025 MHz and 454.300 MHz channels
of Station KLB500, Little Rock, Arkansas

Appearances

Arthur Blooston and *John H. Myers*, on behalf of Otis L. Hale d/b/a Mobilfone Communications; and *Giovanna M. Longo, Susan E. Magnotti*, and *James O. Juntilla*, on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted: October 19, 1983; Released: November 4, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD: BOARD CHAIRMAN MARINO NOT PARTICIPATING.

1. Otis L. Hale d/b/a Mobilfone Communications (Mobilfone) is licensed to operate a two-way VHF and UHF mobile telephone service (Station KLB500) in the Domestic Public Land Mobile Radio Service at Little Rock, Arkansas, and a one-way paging service (Station KQZ752). On February 28, 1979, Mobilfone filed renewal applications for these stations. Mutually exclusive applications were filed by Little Rock Radio Telephone Company, Inc. (LRRTC) and Grant County Radio Telephone Company, Inc. (Grant). By Memorandum Opinion and Order, 47 Fed. Reg. 11960, published March 19, 1982, the Commission designated these applications for hearing on comparative and basic qualifying issues and included an additional Mobilfone application, filed January 26, 1978, seeking to relocate the transmitters of two of Station KLB500'S UHF channels. At their request, LRRTC's and Grant's applications were dismissed with prejudice by Order, FCC 82M-2328, released July 28, 1982. This converted what would otherwise have been a complex comparative renewal proceeding into a simpler inquiry into whether Mobilfone has the requisite qualifications to be or remain a Commission licensee.

2. In an Initial Decision (I.D.), FCC 83D-21, released March 23, 1983, Administrative Law Judge Walter C. Miller (ALJ) denied renewal of all of Mobilfone's applications, concluding that it is 'patently obvious' that Mobilfone lacks the requisite character qualifications to be a licensee.[1] Conclusions, para. 11. Recognizing that Otis L. Hale is the sole proprietor of Mobilfone, the ALJ held that Hale deliberately and continuously lied to the Commission concerning the operational status of his UHF channels, lacked

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[1] The hearing designation order contained a candor issue against Mobilfone (see paragraph 5, *infra*), and by Memorandum Opinion and Order, FCC 82M-2811, released September 15, 1982, the ALJ added a misrepresentation issue (*id.*). The ALJ considered the evidence adduced under these issues jointly since lack of candor and misrepresentation are "both forms of deceit". I.D., note 2.

candor, solicited false testimony from others, mislabeled machinery in an effort to deceive the Commission, and tampered with a Commission witness in an effort to cover up his past misrepresentations, and that "any one of . . . [these] reasons" would justify Mobilfone's disqualification. *Id.* In denying all of the pending applications, the ALJ noted that the hearing designation order afforded him latitude to take less drastic steps, but he concluded that "circumstances do not so warrant". *Id.*, note 46.

3. Exceptions to the I.D. and reply briefs have been filed by both Mobilfone and the Common Carrier Bureau. We have reviewed the I.D. in light of these exceptions and briefs, the oral argument held July 21, 1983, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein, and affirm the ALJ's denial of renewal of the four UHF channels in Station KLB500 and of Mobilfone's application to relocate two of those channels' transmitters. However, in accordance with the Bureau's recommendation, we will return to the processing line Mobilfone's renewal application for Station KQZ752 and that part of the renewal application for Station KLB500 that pertains to its four VHF channels, so that the effect *vel non* of Hale's serious UHF misconduct upon those applications may be independently considered.[2]

4. Mobilfone is the licensee of two-way mobile telephone and paging services in 12 communities in Arkansas and Texas, and has been in business since 1965. Attachment to Station KLB500's 1979 renewal application; Mobilfone Ex. 1, p. 1. Otis Hale is Mobilfone's sole proprietor. *Id.* Hale began operating KLB500 in 1966 with two VHF frequencies. By 1973 he had added two more VHF frequencies, and on August 15, 1973 he applied for the four UHF frequencies on which this proceeding focuses. Bureau Ex. 21. Hale's application was routinely granted on September 16, 1975, and the standard eight months (until May 16, 1976) was allowed for completion of construction. Bureau Ex. 14. No extension of time to construct was requested, and on May 19, 1976 Mobilfone filed a license application to cover its alleged construction of the UHF channels. There it affirmatively indicated that: (1) it had installed four Motorola type-accepted CC 4061C transmitters (in accordance with its construction permit); (2) construction "was . . . completed" on April 12, 1976; (3) the station was "now ready for operation"; (4) "all the terms" of the construction permit had been met; and (5) the station "is [ready] to be open to

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[2] In so doing, we do not hold that non-renewal may not be the ultimately appropriate remedy for these applications, as well. Rather, we defer to the Bureau's request in light of its reasonable interpretation of the hearing designation order, its broad application processing responsibilities, and the conclusory nature of the ALJ's rejection of the Bureau's recommendation. *See also RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

public correspondence" on an "unlimited" time basis. Bureau Ex. 13, pp. 2–4. The license was granted, again routinely, on August 31, 1976, with an April 1, 1979 expiration date. Bureau Ex. 12.

5. At about the same time, on July 21, 1976, Mobilfone filed a separate application for a fifth VHF channel for KLB500. In it, Mobilfone requested a waiver of the requirement that it provide a traffic load study for KLB500's UHF channels, then supposedly in operation for some 10 weeks, but asserted that "should the Commission require a traffic load study for the UHF facility it will be supplied promptly upon request." Bureau Ex. 5, p. 8. On October 28, 1977, the Bureau denied the waiver request and asked for the UHF traffic load study. Bureau Ex. 3. By letter dated December 24, 1977 and filed on January 3, 1978, Hale notified the Commission that it would not provide the requested study and asked that its VHF application be dismissed. Bureau Ex. 2, p. 2. As explanation for the absence of a study, Hale revealed to the Commission for the first time that he had never offered commercial service on any of the four UHF channels and would not do so until the service area was enlarged; a UHF traffic study would therefore not support Mobilfone's further VHF proposal. *Id.* This admission of the total absence of commercial service on the UHF channels was followed 10 days later by a letter notifying the Commission of the "temporary discontinuance of operation of two of KLB500's four UHF channels, with the explanation that one transmitter had a burned up power supply and the other was disconnected in anticipation of filing an application to relocate both transmitters. Bureau Ex. 9. The letter (filed on January 13, 1978) also pointed out: "Neither channel was serving any public subscribers at the time of the discontinuance of operation." *Id.* And when William J. Simpson, the Engineer-in-Charge of the Commission's New Orleans office, inspected the KLB500 facilities on January 12 and 13, 1978, he discovered that only two UHF transmitters were even physically present (not the two described in Mobilfone's January 13 letter), and they were not connected to control circuitry. Bureau Ex. 17, pp. 2, 4.

6. It was against this suspicious factual background that the Commission designated Mobilfone's KLB500 renewal application for hearing on a lack of candor issue (see note 1, supra) to determine whether Mobilfone lacked candor in connection with the operational status of KLB500's UHF channels when it filed its July 21, 1976 additional VHF channel application (paragraph 5, *supra*). In FCC 82M-2811, *supra*, the ALJ enlarged the hearing issues to determine whether Mobilfone had actually misrepresented the facts regarding the construction and operational status of the four KLB500 UHF frequencies in its dealings with the Commission. On the basis of a wealth of documentary and testimonial evidence, the ALJ resolved both of these issues adversely to Mobilfone in the I.D. (Conclusions, paras. 1-11).

7. Mobilfone has filed 13 separate exceptions to the I.D., but they are essentially reducible to four major contentions: (1) Mobilfone was deprived of a fair trial and due process of law because of the "manifest partiality and bias of the court [ALJ]"; (2) Mobilfone did not lack candor or misrepresent facts to the Commission; (3) Mobilfone has a present need for KLB500's four UHF channels; and (4) the renewal application for Mobilfone's Station KQZ752 should not have been denied in this proceeding. Mobilfone Br., at 2–3. We have already determined (see paragraph 3, *supra*) that the KQZ752 renewal application should be returned to the Common Carrier Bureau's processing line for further disposition, which is consistent with Mobilfone's fourth exception, and agree with the ALJ that no "need" conclusions are necessary in this proceeding in light of the non-renewal of Mobilefone's license for the UHF channels on character grounds. I.D., note 42. This moots Mobilfone's third exception. We now turn to Mobilfone's two remaining arguments.[3]

8. At oral argument, Hale's counsel clarified that Mobilfone was "really not charging the Judge with bias" but rather was challenging the ALJ's oft-repeated conclusions in the I.D. that Hale was "a liar, and falsifier, a misrepresenter, and a manufacturer of lies, heaping one lie upon another." Tr. 2255. According to counsel, the ALJ did Hale a "disservice" (because "Hale was not lying") and erred in discrediting Hale's testimony and crediting the contradictory and inconsistent testimony of two "highly disgruntled" former employees, John Gavin and Paul Grist. *Id.* In its brief, at 9–10, Mobilfone also points to the speed with which the ALJ issued his decision (only eight days after reply findings were filed) and the fact that he adopted the Bureau's findings and rejected Mobilfone's as exposing the "unfairness visited on Mobilfone." Finally, Mobilfone complains that the I.D. gave such short shrift to its six witnesses (apart from Hale) that one would think that Mobilfone presented little or no testimony from anyone else. *Id.* Hence Mobilfone calls for a *de novo* review of the record by the Board.

9. We recently had occasion to address the difficulties inherent in reasoned adjudication where, as here, there are numerous apparent or real conflicts in witness testimony. *See Gilmore Broadcasting Corp.*, 95 FCC 2d ___ , 54 RR 2d ___ (Rev. Bd. 1983). As in *Gilmore*, the ALJ made copious credibility findings in the instant case, repeatedly invoking such factors as corroboration by witnesses or documents (I.D., Findings, para. 14), uncontroverted testimony (*id.*), motive to dissemble (*id.*, at para. 23), weight of the evidence (*id.*, at n. 6), and demeanor findings (*id.* at nn. 35 and 36) to sift through the testimony and analyze it. Unlike *Gilmore*, the ALJ here found

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[3] The Bureau's only exceptions also concerned the disposition of Station KQZ752's renewal application and Mobilfone's "need". They are granted and mooted, respectively, for the reasons given in paragraphs 3 and 7, *supra*.

the evidence against Hale to be so overwhelming on a number of specific misrepresentations that he did not shrink from calling him a liar, in addition to merely rejecting his testimony in at least one instance. *Compare* I.D., n. 12 (Hale's argument that he was unaware that Mobilfone's July 1976 VHF application, which he signed, contained a commitment to provide a load study upon request is "rejected") *with* I.D., n. 16 (Hale's contention that he lacked any advance knowledge that KLB500 was going to be inspected is called a "lie"). While such appellations may sting, they do not betoken bias or lack of due process in themselves.[4] And Mobilfone's attack cannot be permitted to obscure the special deference to which the ALJ's credibility evaluations are entitled, coming as they do from the trier of fact who saw and heard the witnesses testify. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63, 66, 36 RR 2d 471, 474 (1976); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 840, 50 RR 2d 1117, 1126 (Rev. Bd. 1981). We have reviewed the I.D. and the record with these precepts in mind and conclude that while this proceeding was spirited it was by no means unfair. As noted in paragraph 3, *supra*, we are adopting the ALJ's findings and conclusions, except as expressly noted in the substantive discussion of Hale's demonstrated character qualification defects, to which we now turn.

10. At the outset, it is important to emphasize that "the Commission has a legitimate interest in the character qualifications of its common carriers." *Service Electric Company*, 86 FCC 2d 52, 67 n. 100, 49 RR 2d 487, 499 n. 100 (1981). The Commission must depend on the accuracy and truthfulness of its licensees' representations, and a breach of that trust or willful false statements is grounds for character disqualification. *See Pass Word, Inc.*, 76 FCC 2d 465, 469, 47 RR 2d 67, 70 (1980) (DPLMRS licenses revoked because of pattern of deliberate misrepresentations and concealment), *aff'd per curiam Pass Word, Inc.* v. *FCC*, 673 F.2d 1363 (D.C. Cir.), *cert. denied*, 103 S.Ct. 89 (1982). Moreover, the Commission's reliance on its licensees' integrity "is as essential to common carrier applications and reports as it is to those of broadcasters." *Id.* The elements of a disqualifying misrepresentation or lack of candor are well-established. While misrepresentation connotes "a false statement of an objective fact intentionally made to deceive," the core of lack of candor is "omission . . . failure to be completely forthcoming in the provision of information which would illuminate a decisional matter." *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1135, 1137, 50 RR 2d 1321, 1324, 1325 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983). In both

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[4] Similarly, we regard the ALJ's broad adoption of the Bureau's findings in this case as an indication of quality, rather than an impropriety. Administrative Law Judges frequently adopt parties' findings in whole or part. As to the alacrity with which the I.D. herein was issued, we commend the ALJ for his conscientiousness and again detect nothing amiss.

instances, disqualification requires a "willful intent to deceive." *Id.*, 88 FCC 2d at 1137, 50 RR 2d at 1325.

11. The lack of candor issue against Mobilfone is narrowly directed to Mobifone's July 1976 VHF application and its commitment to provide a traffic load study of its UHF channels upon request (see paragraph 5, *supra*). In its exceptions, Mobilfone concedes (Br., at 34–35) that Hale knew there were no UHF channel customers at the time the application was filed, but asserts that he was unaware of the commitment to provide the UHF study because he did not "carefully review" the application before signing it. The ALJ found that the study commitment incorrectly implied that commercial traffic existed on the UHF channels in July 1976 (see paragraph 5, *supra*) and rejected Hale's contention that he was unaware of the study commitment. I.D., Findings, para. 18 and n. 12. When the Bureau requested that the UHF traffic study be supplied (see paragraph 5, *supra*), Mobilfone's counsel filed a letter on November 28, 1977 indicating that the study was in progress (which was not the case) and requesting a 30-day extension to respond. Hale's testimony first disclaimed any knowledge of the incorrect representation, them implicated his counsel, and finally blamed his consulting engineer for providing incorrect information to his counsel. I.D., Findings, paras. 35, 36. The ALJ concluded that the November 28 letter was a further uncandid response by Hale concerning the operational status of his UHF channels (*id.*, at para. 33) and rejected his testimony that he was unaware of the erroneous study-in-progress representation (*id.*, at para. 27). As to all of these matters Mobilfone pleads error, failure of adequate supervision by Hale (which he allegedly has long since remedied), and lack of intention to deceive.

12. We affirm the ALJ's conclusion that Mobilfone lacked candor in this matter and exhibited a willful intent to deceive in its application and time extension statements to the Commission, which implied that commercial traffic existed on Mobilfone's UHF facilities during 1976–1977. Whether or not Hale concedes that *he* knew there was no such traffic, he did not formally notify the Commission of this fact until January 3, 1978, some 19 months after such service was to have begun (see paragraphs 4 and 5, *supra*). The Commission must be able to rely on representations made in applications and requests for extensions of time, *Pass Word, Inc., supra*, and on the logical inferences that can be drawn from such representations. In the instant case, it is clear that an erroneous impression was intentionally created in Mobilfone's VHF application filings that UHF traffic existed on KLB500, and we join in the ALJ's incredulity that Hale was unaware of this lack of candor or can escape responsibility for it by blaming others.[5] *See RKO General, Inc.* v. *FCC*, 670 F.2d 215, 231

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[5] We note that Hale's engineering consultant, Glenn Elliott, did not testify in this

(D.C. Cir. 1981) (advice of counsel cannot excuse licensee's breach of duty to keep Commission fully informed); *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 16 RR 2d 946 (1969) (applicant is ultimately responsible for the contents of his application). We note in particular that Hale's DPLMRS experience dates back at least to 1965 (see paragraph 4, *supra*) and that Hale is Mobilfone's sole proprietor. When applications have been denied because of the delicts of even *minority stockholders* who had significant managerial positions, *e.g.*, *WNST Radio*, 70 FCC 2d 1036, 44 RR 2d 492 (Rev. Bd. 1978) (misrepresentations by 12.5% stockholder, president and director of applicant), our concern is geometrically greater where a *sole owner's* application is shown to lack candor and that owner (Hale) claims ignorance.

13. We are equally unimpressed with Hale's "mitigating" argument (Mobilfone Ex. 1, pp. 5–6) that, had he noticed the proffer of a UHF study in his VHF application, he "might not have considered it improper or misleading" because he knew that in 1976 the application processing time was . . . more than one year. At the time [he] signed the VHF application, [he] fully believed that by the time it was reached for processing the UHF channels would have been serving customers and a traffic load study could be submitted." This gamesmanship approach to application submissions cannot be condoned; moreover, Hale's cavalier and calculating attitude belies his claimed ignorance of the application's contents and supports an inference of willful intent to deceive. Nor are we moved by Hale's admission that during the period of time in question he failed to devote enough time to Mobilfone's business and delegated too many responsibilities to others but now takes "a closer personal interest in Mobilfone's day-to-day operations." Mobilfone Ex. 1, pp. 7–9. Such corrective efforts are welcome and long overdue but do not diminish our concern about Hale's previous lack of candor, which we believe to have been sufficiently willful and grave to warrant Mobilfone's disqualification. *Compare Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983) (applicant disqualified because of pattern of intentional deception) *with Coastal Bend Family Television, Inc.*, 94 FCC2d 648, 54 RR 2d 367 (Rev. Bd. 1983) (substantial comparative demerit assessed for serious lack of candor found to be clumsy rather than willful).

14. The misrepresentation issue in this proceeding is much broader than the candor issue and the ALJ grouped his findings and conclusions under three main rubrics: "the original misrepresentations" (concerning Mobilfone's May 19, 1976 license application for KLB500's four UHF channels - - see paragraph 4, *supra*); "the

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proceeding and thus was unavailable to corroborate or refute Hale's charges. Hale did not attribute blame for the November 28, 1977 time extension letter to Elliott until September 28, 1982 (Mobilfone Ex. 8., p. 1), after Mobilfone learned that Elliott could not be subpoenaed.

continuing nature of Hale's misrepresentations" (Fall 1976 through January 1978); and "Hale's Form 'L' misrepresentations" (reporting forms filed from 1977 through 1981).[6] I.D., Findings, paras. 5–26.

15. As to Mobilfone's license application for the UHF channels, the ALJ concluded that Mobilfone falsely represented to the Commission each of the following matters: it had completed construction of the channels on April 12, 1976; the station was "now" ready for operation; the station was open to public correspondence; and four Motorola CC 4061C transmitters had been installed. See paragraph 4, *supra*; I.D., Findings, paras. 10, 11. According to the ALJ, Mobilfone had not even begun construction of any of the four base stations by April 12, 1976; prior to April 1982, at most two transmitters were fully installed - - in late Fall 1977 - - and they were immediately disconnected because of technical problems; none of the four channels was open to public correspondence until April 1982, when two channels were opened; and Mobilfone never attempted to install authorized CC 4061C transmitters but instead only took steps to install unauthorized CC 4018C transmitters bearing altered identification plates. I.D., Findings, paras. 11–22 and nn. 6–20 & 37.

16. In the face of this devastating indictment, Mobilfone's exceptions studiously attempt to combat each adverse finding with stout denials, attacks on the ALJ's credibility findings, and novel interpretations of documentary evidence. These efforts, though vehement, are almost wholly unconvincing when weighed against the record evidence. And where they do convince, the victory is so minor that it is not decisionally significant. We need only highlight the carnage.

17. Mobilfone steadfastly maintains that all of its license application representations, except openness for public correspondence, were essentially accurate. As to the absence of public correspondence, which was first brought to the Commission's attention on January 3, 1978 (see paragraph 5, *supra*) - - some 19 months after the contrary representation was made - - Mobilfone urges that the failure to inform the Commission sooner was merely "inadvertent oversight." Mobilfone Br., at 27. On the other hand, it argues that all four UHF channels were indeed constructed as of April 12, 1976 (although two were disconnected on November 21, 1977 because of technical problems - - see paragraph 5, *supra*); that four CC4018C transmitters were obtained, "converted" into CC4061C transmitters, and installed on April 12, 1976; and that Mobilfone reasonably

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[6] The ALJ also treated "Hale's efforts to blame others for his misrepresentations" and "Hale's efforts to get others to misrepresent." I.D., Findings, paras. 27–46. We need not separately examine these topics, since the breadth and depth of Mobilfone's intentional and material misrepresentations are more than amply demonstrated by his other findings and conclusions to justify Mobilfone's disqualification under this issue.

believed that the four channels were ready for operation as of May 19, 1976, the date that the license application was filed.

18. While it is not possible on this record to pinpoint the exact date on which any of Mobilfone's UHF channels was fully installed, we affirm the ALJ's conclusion, based essentially on the testimony of technicians John Gavin, Melvin Dunkle, and Paul Grist and on Work Order 7548, dated August 16, 1976 (Mobilfone Ex. 22, p. 1), that construction of the channels was not completed on or before April 12, 1976, or even on or before May 19, 1976. This conclusion alone has serious character qualification implications because the entire process of issuing licenses to cover station construction is rendered meaningless if permittees are allowed, with impunity, to attest to construction that has not actually occurred. *See Pass Word, Inc., supra*. The fact that some construction may have been completed on or about August 16, 1976 (the Work Order says "set up station" and "install" two stations),[7] during the Spring or Summer of 1977 (Gavin's hearing testimony, Tr. 913–15), in the "late fall of 1977" (I.D., Findings, para. 19), or not until April 1982 (see paragraph 15, *supra*) is therefore beside the point.

19. It is similarly irrelevant that, according to Mobilfone, it erroneously believed (albeit in good faith) that it had properly converted four CC 4018C transmitters into CC 4061C's. Its initial application, construction permit, license application, and license (Bureau Exhs. 12, 13, 14, 21) all represented that CC 4061C transmitters with 90 watts output power would be or had been installed - - which was not the case - - and Mobilfone concedes (Br., at 23) that it should have informed the Commission that it was attempting to meet construction requirements with converted CC 4018C transmitters. While Mobilfone argues that its allegedly good-faith conduct and "errors of omission" (*id.*) cannot be equated with deliberate actions to mislead or misinform the Commission, we disagree. Had Mobilfone properly represented its actions to the Commission, it could have been advised of the technical impossibility of its effort or its construction permit could have been appropriately modified. Instead, it affirmatively misrepresented its construction efforts in its license application and, in addition violated Commission rules then in effect (Sections 2.1101(d) and 2.925(b) and (c)) by switching transmitter identification plates without Commission authorization. These acts do not square with Mobilfone's claim that the record contains "no credible evidence of any intentional effort to

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[7] Maintenance technician John Purcell testified (Tr. 718) that "install" meant "put them back in place," but Gavin insisted that the Work Order pertained to new installation, not repairs (Tr. 1036, 1204). The ALJ found (I.D., Findings, para. 19) that the Work Order confirmed that installation steps began in "early fall of 1976," implicitly resolving the testimonial conflict between Gavin and Purcell in Gavin's favor. Such findings, based on demeanor and credibility, are entitled to special deference. See I.D., Findings, n. 35; paragraph 9, *supra*.

deceive the Commission about any aspect of the construction or operation of the UHF facilities of Station KLB500" (Br., at 23). Rather, Mobilfone's conduct reveals a willful intent to cover up station construction that was not in accordance with Mobilfone's construction permit.

20. Finally, Mobilfone disputes the ALJ's finding that Mobilfone knew its UHF transmitter site would not provide "a good grade of service" at the time it filed its UHF application in August 1973. I.D., Findings, n.4. Since transmitter relocation studies began only in June 1973 and continued through 1975 (*id.*), Mobilfone is probably correct that it cannot properly be charged with true "knowledge" of the site and service deficiencies as of August 1973. However, with the studies completed in November 1975, Mobilfone must be charged with this knowledge as of May 1976, when it filed its UHF license application. Yet that application contained the (mis)representation that the station was "ready for operation". While Mobilfone maintains that it could not know *with certainty* that there were site deficiencies until after the channels were installed and range tests were performed, the Board concludes that it already had accumulated sufficient information to require appropriate Commission notification. Instead, Mobilfone affirmatively professed service readiness and only informed the Commission of its adverse test results on January 3, 1978 - - more than 19 months after range tests supposedly began - - and revealed for the first time that no commercial service had *ever been offered* on the UHF channels (see paragraph 5, *supra*). This notification delay, which Mobilfone lamely attributes to "inadvertent oversight" (see paragraph 17, *supra*), not only furthered Mobilfone's original misrepresentation of readiness but itself constituted a violation of the Commission's rules, which require *prior permission* for voluntary discontinuance, reduction, or impairment of public communication service (Section 22.303(b)) or notification *within 48 hours* thereafter of involuntary discontinuance, reduction, or impairment (Section 22.303(a)). Such egregious conduct strongly supports the inference of a willful intention to deceive concerning the operational status of KLB500's UHF facilities.

21. Much has already been said about Mobilfone's (or Hale's) misrepresentations from Fall 1976 through January 1978. See paragraphs 15–20, *supra*. The only additional point meriting consideration is Hale's contention that he had no advance notification of the Commission's January 12–13 inspection of KLB500's facilities. See paragraph 9, *supra*. This assertion has significance because of the ALJ's conclusions that Hale "took steps to prepare for the upcoming inspection," *i.e.*, to cover up or alibi for the non-operational status of any of the four UHF channels at the time of the inspection.[8] We concur with the ALJ's view that Hale must have had

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[8] For example, Mobilfone's January 3 and 13, 1978 filings concerning its UHF

advance notice, perhaps as much as 24 days. For, on December 19, 1977, Hale's counsel inspected certain Commission records, pursuant to a Mobilfone Freedom of Information Act request, which included a copy of a December 8, 1977 memorandum to the Field Operations Bureau (from the Common Carrier Bureau) requesting an inspection of KLB500 within 30 days. Bureau Exhs. 24, 25. It would be incredible if counsel did not promptly inform Hale of that request and the likelihood of an imminent inspection. The "coincidental" filing of the exculpatory letters reference in note 8, *supra*, in early January 1978 belies Hale's claimed ignorance of the impending inspection and further supports the conclusion that Hale lied to the Commission about this - - just another link in Hale's "whole network of fabrications" (I.D., Conclusions, para. 5).

22. Little discussion is needed about Hale's Form L misrepresentations. As the ALJ found, on June 30, 1977 Mobilfone filed an FCC Form L for KLB500 for calendar 1976, in which Hale represented that only four of KLB500's eight authorized VHF and UHF channels were "in service". Two months later, he amended the report to show all eight stations as "in service". The following year he reported that six channels were in operation during 1977, and he subsequently repeated this six-channel report for calendar 1978, 1979, and 1980. I.D., Findings, para. 25–26. When Hale was asked at hearing how these reports jibed with his January 3, 1978 disclosure that no commercial traffic had ever occurred on any of the four UHF channels and would not occur until the transmitters for two of the channels were relocated, he replied, incredibly, that "in service" doesn't really mean "in service"; it just means that the stations have been constructed and are "capable of providing service" within a day or two! Tr. 499–500, 560. While George Orwell might be proud of Hale's "newspeak,"[9] this excuse for Hale's misrepresentations of the operational status of his UHF facilities over a five-year period is palpably absurd and cannot be taken seriously by either the ALJ or the Board. Misrepresentations on Commission reporting forms are not trifling matters. *See Pass Word, Inc., supra*.

23. Taking the misrepresentation issue as a whole, we conclude that the record abundantly demonstrates that Otis Hale has indeed been involved in an extensive network of blatant and subtle misrepresentations before this agency since at least 1976 and up to and including the 1982 hearing herein. Falsity, materiality, and willful intention to deceive are all evident, *Fox River Broadcasting,*

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channels (see paragraph 5, *supra*) were both dated and filed prior to the conclusion of the inspection but after December 19 (they are dated December 24, 1977 and January 12, 1978, respectively).

[9] *See* Orwell, *Nineteen Eighty-Four* (1949) *passim*; newspeak is propagandistic language marked by ambiguity and contradictions. See also note 7, *supra*, for another illustration of Mobilfone newspeak, in which "install" and "set up" mean "repair existing equipment".

Inc., *supra*, and even a motive is clearly discernible (although motive to misrepresent need not be shown, where, as here, willful intent to deceive is present).[10] That motive is "warehousing," not in the anti-competitive sense that the ALJ found (a desire to keep out competition in the Little Rock market by monopolizing frequencies), but rather in the pure storage sense urged by the Bureau (an unjustified six-year delay in providing service on licensed frequencies). In other words, having decided by May 1976 to shelve the use of the four UHF channels licensed to it, Mobilfone and Hale proceeded to cover up this abuse of spectrum and the Commission's processes for 19 months—until January 1978—by a variety of misrepresentations and lack of candor. And some misrepresentations continued right up to 1982. Thus, we do not adopt the ALJ's "anti-competitive" warehousing findings, but do find that "storage" warehousing had a role in Hale's serious misconduct. While this finding is not needed in order to establish that Hale engaged in a disqualifying array of willful misrepresentations in this proceeding (see note 10, *supra*), it is helpful in fathoming Mobilfone's delicts.

24. All exceptions having decisional significance have been considered by the Board. The record in this proceeding makes it clear beyond peradventure that Mobilfone and its sole proprietor Otis Hale have engaged in a pattern of intentional misrepresentations and lack of candor as licensee of Station KLB500's four UHF channels that is so egregious that Mobilfone lacks the requisite character qualifications to remain a licensee of those UHF channels. *See Pass Word, Inc.*, *supra*; *cf. Country Broadcasting Co.*, *supra*. Unfortunately for the Commission and Mobilfone, this is not the first time that a licensee has abused our licensing and frequency allocation processes by not timely constructing its facilities and then obtaining a license to cover the non-existent construction by deceit. See *Pass Word, Inc.*, *supra*. Once embarked on such a course of action, one misrepresentation begets another. We have carefully examined Mobilfone's denials, explanations, and mitigating arguments (*see* paragraphs 12, 13, 19, and 20, *supra*), but they are wanting. The only appropriate remedy for such utter disregard for the Communications Act of 1934, the Commission's rules, and the public service responsibilities of a common carrier licensee is non-renewal. *See Pass Word, Inc.*, *supra*; *The Telephone Company, Inc.*, 65 FCC 2d 605, 41 RR 2d 611 (1977). However, as indicated in paragraph 3, *supra*, we will return Station KQZ 752's renewal application and the VHF portion of KLB500's renewal application to the Common Carrier Bureau's processing line, so that the effect *vel non* upon

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[10] To add a misrepresentation issue, the necessary *prima facie* showing must include "some evidence of a logical reason, desire, intention *or* motive to deceive . . . or misrepresent" (emphasis added). *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1176–7, 49 RR 2d 1001, 1005 (Rev. Bd.), *rev. denied*, 50 RR 2d 802 (1981). To prove the issue once added, again only intention *or* motive need be demonstrated.

those applications of the serious misconduct that has been established in this proceeding may be independently considered.

25. ACCORDINGLY, IT IS ORDERED, That the motion to correct transcript references filed August 17, 1983 by Otis L. Hale d/b/as Mobilfone Communications IS GRANTED.

26. IT IS FURTHER ORDERED, That the part of the renewal application of Otis L. Hale d/b/a Mobilfone Communications for Station KLB500 (File No. 23697-CD-R-79) that pertains to its four UHF channels IS DENIED; and that the part of the renewal application that pertains to its four VHF channels IS RETURNED to the Common Carrier Bureau for further processing in accordance with this Decision, along with the renewal application for Station KQZ752 (File No. 23700-CD-R-79).

27. IT IS FURTHER ORDERED, That the application of Otis L. Hale d/b/a Mobilfone Communications to relocate two of the UHF channels of Station KLB500 (File No. 20741-CD-P-(2)-78) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 83D–21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS	CC Docket No. 82–15 File No. 23697-CD-R-79
For renewal of license of Station KLB500 authorized to operate on 152.03 MHz, 152.09 MHz, 152.18 MHz, 152.21 MHz, 454.025 MHz, 454.125 MHz, 454.200 MHz, and 454.300 MHz, in the Domestic Public Land Mobile Radio Service at Little Rock, Arkansas	
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS	CC Docket No. 82–16 File No. 23700-CD-R-79
For renewal of license of Station KQZ752 on 152.24 MHz and 158.70 MHz in the Domestic Public Land Mobile Radio Service at Little Rock, Arkansas	
OTIS L. HALE d/b/a MOBILFONE COMMUNICATIONS	CC Docket No. 82–17 File No. 20741-CD-P-(2)-78
For Construction Permit to relocate 454.025 MHz and 454.300 MHz channels of Station KLB500, Little Rock, Arkansas	

Appearances

Chase Libbey, *Gerard Duffy*, *John Myers*, and *Arthur Blooston* on behalf of Otis L. Hale d/b/a Mobilfone Communications; *Philip V. Permut* on behalf of witness Robert Hawkins of Motorola, Inc.; and *Giovanna M. Longo*, *Susan S. Magnotti* and *James O. Juntilla* on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: March 16, 1983; Released: March 23, 1983)

Preliminary Statement

1. Otis L. Hale d/b/a Mobilfone Communications (Hale) seeks: (1) a license renewal for Station KLB500 authorized to operate on 152.03 MHz, 152.09 MHz, 152.18 MHz, 152.21 MHz, 454.025 MHz, 454.125 MHz, 454.200 MHz, and 454.300 MHz in the DPLMRS, Little Rock, Arkansas; (2) a license renewal for Station KQZ752 on 152.24 MHz, and 158.70 MHz, in the DPLMRS, Little Rock, Arkansas; and (3) a CP to relocate 454.025 MHz, and 454.300 MHz of Station KLB500, Little Rock, Arkansas.[1]

2. The proceeding was designated for hearing on February 24, 1982 (47 F.R. 11960 published March 19, 1982). After the interlocutory pleading cycle had run its course, the following issues remained for resolution:

". . .

6. To determine whether Mobilfone has need for the UHF frequencies of Station KLB500;

7. To determine whether Mobilfone exhibited a lack of candor in connection with the operational status of UHF facilities of Station KLB500 in its application for an additional frequency (152.12 MHz) for Station KLB500, File No. 22554-CD-P-76);

7(a). To determine whether Mobilfone misrepresented, or caused to be misrepresented to the Commission the facts regarding construction and the operational status of the four KLB500 UHF frequencies; and

. . .

10. To determine in light of the evidence adduced pursuant to the foregoing issue(s) what actions with respect to the above-captioned applications would best serve the public interest, convenience and necessity."

3. Hearing conferences were held on June 3, September 16, and October 4, 1982; evidentiary admissions sessions took place on August 16 and September 9, 1982; and hearings on October 18–23, 1982 in Little Rock, Arkansas and on December 6–8, 1982 in

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[1] In its Designation Order (47 F.R. 11960 published March 19, 1982) the Commission expressly directed that the Presiding Officer consider; i.e., grant or deny these three sets of applications. Hale has several other stations that the Commission didn't want included in this case (47 F.R. 11960 at Footnote 11). So, under the *Grayson* doctrine, the Commission concluded that it would be in the public interest to go ahead and assign the licenses for those other "uninvolved" applications (47 F.R. 11960, at paras. 22–23). This is being pointed out at the outset because, in its Proposed Findings of Fact, Common Carrier Bureau counsel (CCB) places a strained and warped interpretation on the Commission's clear and unambiguous language. See the Bureau's recommendation at pages 110–112 of its Findings. This will be discussed further at Conclusions 13–15 *infra*.

Washington, D.C. The record was ultimately closed on February 10, 1983 (FCC 83M-519).

4. Hale and the Bureau each filed Proposed Findings of Fact and Conclusions of Law on February 8, 1983, and Reply Findings on March 8, 1983.

Findings of Fact

Issues 7 and 7(a) - The Candor and Misrepresentation Issues [2]

The Original Misrepresentations

5. Otis Hale started operating KLB500 in 1966 when he was granted two VHF frequencies. By 1973, he had added two more VHF frequencies. Then on August 15, 1973, he applied for the four captioned 454 MHz UHF channels.[3]

6. In the UHF application Hale made a host of important representations. He said he wanted to use the four UHF frequencies ". . .exclusively for a fully automatic interconnected dial two-way radio service." He represented that he would pour $86,000 into that operation. This would include $72,000 for transmitters and receivers, $4,000 in antennas or antenna transmission lines, and $10,000 in miscellaneous equipment.

7. Hale also indicated that he would employ a continuously operated CDS-45 Fan-Tron terminal with the control point and the transmitters connected by landline control circuitry. The trunking effect of the UHF four channel system, said Hale, will allow 35 to 50 subscribers to be served on each channel "with a good grade of service."[4]

8. Most importantly, Hale represented that he would construct four UHF base stations, *and use Motorola type accepted CC 4061C*

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[2] Evidence adduced under Issues 7 and 7(a) can be considered jointly. They are both forms of deceit. See *Fox River Broadcasting, Inc.*, FCC 83–49 released February 2, 1983.

[3] Actually the planning for the August 15, 1973 application took place much earlier. In fact, Glenn Elliott (Hale's engineering consultant) certified the engineering section and Hale himself certified the entire UHF application a month and a half earlier - on June 28, 1973.

[4] Hale knew this representation was false when he made it. His proposed UHF transmitter site was to be located only 2 blocks east of the First National Bank Building, and the sites' authorized radiation center was to be 30 feet below the top of that building. So he was aware from the outset that his UHF channels would experience severe "shadowing" in the area from the northwest to the southwest of the site. Construction on the Bank Building began in 1973; the exterior skin and the height of the building were completed in July 1974; and all construction was finished in March, 1975. So long before the four 454 MHz applications were granted (on September 16, 1975) Hale knew his proposal couldn't provide "a good grade of service." In fact, one of Hale's employees - Robert Zicker - spent a tremendous amount of time between June 1973 and November 1975 doing countour studies to determine where to relocate the UHF stations that hadn't yet been authorized (MC Ex. 1, pp. 6–7; Tr. 1643, 1735–1738, 1910–1911 and 1941).

transmitters with 90 watts of output power. He further stated that because an interconnect agreement already existed ". . . service to the public can be offered in a relatively short time from date of grant" (MC Ex. 1, p. 2; CCB Ex. 21, pp. 2–3, 6, 8–9; Tr. 255–256).

9. On August 8, 1975, the Commission wrote Hale. They asked him, *inter alia*, if he had the equipment to implement his UHF proposal. He responded on September 8, 1975. He said, "of the equipment necessary to effectuate this proposal, the four base stations . . . are on hand and paid for . . . The terminal equipment is to be provided by Fan-Tron Corporation and financing is available through that Company . . ." (CCB Ex. 20, p. 2). The Commission is granted Hale's 454 MHz CP eight days later, and set down a required completion and construction date of May 16, 1976 (CCB Ex. 14).

10. On May 19, 1976, Mobilfone filed for a license to cover its CP. There Hale swore: (1) that he had completed his UHF construction on April 12, 1976; (2) that the UHF 454 MHz channels were now already for operation; (3) that he had four Motorola Type Accepted CC 4061 transmitters installed; (4) that the station was ready for public correspondence on an unlimited time basis; and (5) that "We are presently holding applications for the proposed service to approximately 95 mobile units."[5]

11. *Intermediate Findings*. At the hearing it developed that all five of Hale's representations were false. He hadn't completed construction of the four base stations by April 12, 1976. In fact, he hadn't even started construction by that date. None of the four stations were ready for operation.

12. On May 19, 1976, Hale had no Motorola Type Accepted CC 4061C transmitters in his possession - let alone installed. In fact, Hale didn't have any type accepted UHF transmitters available capable of 90 watts output power.[6] [7] The KLB500 UHF stations

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[5] Thus Hale was fortifying his previous representation that he could offer service to the public shortly after grant. See Finding 8 *supra*.

[6] Back in 1972 or 1973, Hale purchased six used CC 4018 UHF transmitters. Throughout the hearing he continuously asserted that he had converted four of these CC 4018s into CC 4061s and that they were in operating condition and installed on April 12, 1976. This assertion is rejected. It is contrary to the weight of the credible evidence. The testimony of Robert Hawkins of Motorola, Inc., a disinterested witness, is credited. He demonstrated that the CC 4018 and CC 4061 transmitters are entirely different; that they are rated at different RF output powers; and that the CC 4018 with a 60 watt output couldn't be operated at 90 watts output power (see CCB PFs A20-A25, and A43).

[7] The record shows that Hale purchased the used Motorola CC 4018s under bizarre circumstances. He ostensibly bought them for about $3500 from or through Mr. Ray Windle who was at that time Motorola's RCC National Marketing Director. Shortly after the transaction was completed, Windle left Motorola and went to work for Hale. Neither man could produce any sales receipts. The transaction was ostensibly one of a series of other nonrelated transactions between Hale and Windle. And when he was asked how title to the equipment was made out, Windle said "I'm sure it said sold to cash . . . I'd almost bet on it." In any event Hale never

weren't open for public correspondence on an unlimited time basis. In fact, they weren't open for public correspondence at all. In addition, it develops that the Fan-Tron terminal was kept on the Fan-Tron Corporation's premises and was never even connected to the unauthorized Motorola transmitters (Tr. 527, 1937–1938).

13. Intermediate findings 11–12 *supra*, basically accept the Bureau's version of what has transpired. As the Bureau points out at Al, Page 1 of its Proposed Findings, Mobilfone and the Bureau witnesses disagreed substantially on the fundamental facts and irreconcilably on the date the UHF stations were constructed, the number of transmitters involved, whether the equipment was authorized or not, and whether any *bona fide* range tests were ever performed. The Bureau's findings about what has occurred have been credited and Mobilfone's rejected.

14. Based on the observation of all the witnesses, the Bureau witnesses demonstrated more reliability and trust-worthiness. As previously noted (Footnote 6 *supra*), Robert Hawkins' testimony was especially pursuasive and helpful. The testimony of Bureau witnesses on several important points was either uncontroverted or confirmed by either Hale or other Mobilfone witnesses; e.g. Mel Dunkle. Most importantly, the Bureau's version of what transpired has been corroborated by Mobilfone documents. See CCB Conclusions 8–10.

15. Subsequently, on May 10, 1976 (after the UHF stations had allegedly been installed and placed in public operation), Hale began to take his first steps toward getting two of the four UHF frequencies operable. Mobilfone's engineering consultant, Glenn Elliott, sent an internal memorandum to Hale's two technicians - John Max Gavin and John Purcell[8] There Elliott directed the technicians, *inter alia*, to be certain that the "Top section of .125 and .300 antennas will be 454.125 and top section of .025 and .200 antenna will be 454.200" (MC Ex. 22, p. 3). This Memorandum corroborates the Bureau's contention that Hale's original representations were false.

16. Similarly, an invoice from Decibel Products, Inc. shows that on May 27, 1976, Hale ordered antennas and duplexers for the UHF 454.200 and the 454.025 frequencies. That equipment wasn't even delivered until June 16, 1976 - well after Hale claimed they had been installed (MC Ex. 22, p. 3).[9]

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paid anything close to the $72,000 that he represented in his application he would pay (MC Ex. 27; Tr. 476-480, 489, 584–595 and 617–618).

[8] John Max Gavin worked as Technician for Hale from 1961 until May 2, 1980. He appeared as a Common Carrier Bureau witness (see CCB Findings A88-A94). John Purcell was and still is Otis Hale's Technician-Service Manager (Tr. 678).

[9] Throughout the hearing, Hale continued to assert that he had all four UHF stations installed and operable by April 12, 1976. But, aside from a suspect maintenance log (discussed *infra*), Hale produced no work orders or other basic documents which would substantiate that claim.

The Continuing Nature of Hale's Misrepresentations

17. Shortly after he had ostensibly constructed his four 454 UHF frequencies, Hale applied for an additional VHF channel for KLB500; i.e., 152.12 MHz. That application was filed on July 21, 1976, and was mutually-exclusive with another application that Grant County Radio Telephone Company (Grant County) had filed two months before; i.e., on May 18, 1976.[10]

18. With its 152.12 MHz application, Mobilfone submitted a traffic load study for the four KLB500 VHF channels. But it submitted no such study for the four KLB500 UHF channels. Instead it asked for a waiver of that requirement.[11] "However," said Hale, "should the Commission require a traffic load study for the UHF facility it will be supplied promptly upon request"[12] (CCB Ex. 5, p. 8). Thus Hale implied that there was public correspondence that would permit such a study to be made.

19. In the early fall of 1976, Mobilfone apparently stated taking steps to install two of the four KLB500 UHF transmitters.[13] Mobilfone Work Order No. 7548 dated August 10, 1976 confirms that fact. However, the record also shows that because Hale had decided

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[10] Grant County contended that Hale's July 21, 1976 152.12 MHz application was a "strike" application. And in support, it argued unsuccessfully that Hale had failed to put its four KLB500 UHF channels into service. See 47 F.R. 11960 published March 19, 1982 at paras. 11–19.

[11] Despite the alleged existence of applications for some 95 UHF mobile units. See Finding 10 *supra*.

[12] At the hearing Hale argued that although he had certified the 152.12 MHz application he wasn't aware (until after the February 24, 1982 designation order) that he had committed himself to providing a traffic load study upon request (MC Ex. 1, pp. 5–7). This argument is rejected. It's inconsistent with other evidence that Hale himself - as well as the Bureau - has presented. It strains credulity to believe that an experienced RCC operator with the numerous stations Hale has, and who had personally represented that he had 4 operating 454 MHz UHF frequencies with orders for some 95 mobile units wasn't aware of his representations to the FCC. This will be discussed further *infra*.

[13] On August 6, 1976, the Commission designated Docket 20871 (the Memphis, Tennessee proceeding) for hearing. An issue was designated in that case to determine whether Hale had engaged in anti-competitive conduct in the greater Memphis, Tennessee area. So Hale had an incentive to get his act in order. See 79 FCC 2d 414 (1979), para. 1, Issue 1. But even assuming that two of the four UHF stations were eventually installed, they were installed with unauthorized transmitters (TR. 913–919, 928, 1249; MC Ex. 134, pp. 185–186). Hale points to a maintenance log that he claims proves that all four UHF stations were installed on April 12, 1976. But that maintenance log can't be credited. The record shows, *inter alia*, that portions of it were fabricated, and that Hale's Service Manager, John Purcell, made noncontemporaneous entries on the log. Moreover, when Mel Dunkle (Hale's own witness) left Hale's employment on December 31, 1976, none of the KLB500 UHF transmitters had been installed (Tr. 656, 659–661, 676, 702–708, 759–762, 1542–1544 and 2013–2015).

to install the unauthorized lower-power CC 4018 transmitters instead of the 90-watt CC 4061s,[14] and because that decision led to technical installation problems, the two 454 MHz transmitters weren't installed until the late fall of 1977 - if they were finally installed at all. In any event, they were immediately disconnected. One UHF transmitter was removed because it caused interference to Hale's Channel 5 and the other because of a burned up power supply. No public correspondence was ever carried on either (CCB Ex. 16, p. 8; CCB Ex. 31 and 31A, p. 2; CCB Ex. 33 and 34, p. 2; MC Ex. 12, p. 1; MC Ex. 22, p. 1; MC Ex. 34, pp. 185–186; MC Ex. 35, pp. 86, 155–156, 182, 197, 210–211 and 243–245; Tr. 364–373, 656–661, 675, 913–919, 928, 1249, 1289–1290, 1292, 1307–1308,

20. Shortly thereafter, on or about December 19, 1977, Hale learned that the Commission was going to inspect Hale's KLB500 facility at Little Rock - among others (see CCB PFs A62–67).[15] [16] He immediately wrote a letter to the Chief, Mobile Services (dated December 24, 1977). The FCC received that letter on January 3, 1978. There, for the first time, Hale admitted he had never offered commercial service on the 4 KLB500 UHF frequencies (CCB Ex. 2). And on January 12, 1978 (the date the inspection started on KLB500), Hale notified the Commission that he had temporarily discontinued operation on two of the KLB500 UHF frequencies (CCB Ex. 9).

21. The FCC inspection of KLB500 took place on January 12–13, 1978. It was conducted by William J. Simpson, the Engineer in Charge of the Commission's New Orleans office. The inspection was no surprise. Hale told Simpson he (Hale) had been looking for him (Tr. 1527; but see Footnote 16 *supra*). During that inspection Simpson was shown the maintenance log for KLB500 UHFs which

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[14] Motorola witness Robert Hawkins testified that the CC 4018 transmitter was mistakenly type accepted and rated at an RF output power of 70 watts. But, he said, its maximum output power is 60 watts (CCB Ex. 43, pp. 2–3; Tr. 2228–2230).

[15] Remember Hale had already been accused of "stockpiling" or "warehousing" frequencies in the Memphis, Tennessee case (Footnote 13 *supra*). And based on complaints in that proceeding, Hale's stations in El Dorado, Pine Bluff, and Hot Springs, Arkansas, were inspected during the week of June 13, 1977. *See CCB Ex. 17(a).* An analysis of those inspection reports show that Hale had made misrepresentations in connection with those three operations. So, except for a benign Common Carrier Bureau, Hale would be in deeper trouble than he is already.

[16] During the hearing in this case Hale even tried to lie about when he first learned that KLB500 was going to be inspected. He asserted that he had no advance notice that KLB500 was to be so subjected. However, since Mobilfone's counsel became aware of the imminent KLB500 inspection on December 19, 1977, there is no earthly reason to believe that Hale wasn't personally informed within a day or two thereafter and that he took steps to prepare for the upcoming inspection.

indicated that four Motorola CC 4061C transmitters had been installed on April 12, 1976.[17] [18] Simpson inspected two of the KLB500 UHF transmitters and saw transmitter type acceptance numbers CC 4061C on them (Tr. 1500, 1508–1509).[19]

22. During the inspection Simpson was shown the KLB500 UHF log that states that on November 21, 1977 the 454.025 MHz transmitter was removed because of interference to Channel 5 and the 454.300 MHz transmitter was removed because of a burned up power supply (CCB Ex. 16, p. 8). However, when he asked Purcell why they had been removed, Purcell told him they were removed because of "intermodulation" problems (Tr. 1520–1521; CCB Ex. 17, p. 4). When he discussed the same problem with Hale, Hale told him they'd been removed because of "dead spots" caused by new construction.[20] Simpson also discovered that the two UHF transmitters he saw installed for the KLB500 UHF facilities weren't connected to control circuitry (CCB Ex. 17, p. 4).

23. *Intermediate Findings*. The evidentiary record is replete with numerous other instances of Hale's continuing misrepresentations.[21] But the point is this: In an effort to thwart RCC competition in the Little Rock area; i.e., in an effort to keep a competitive market-place from being created, Hale "stockpiled" or "warehoused" the four KLB500 454 MHz UHF frequencies. He accomplished his stockpiling plan by misrepresenting several vital facts to the Commission. And having done so, he was then obliged to keep repeating and embellishing on those misrepresentations. The net result is a whole network of fabrications - one lie heaped on another.

Hale's Form "L" Misrepresentations

24. Nowhere is the fabricated network more evident than in the case of Hale's Form Ls. On June 30, 1977, Mobilfone filed an FCC Form L for KLB500 for calendar 1976. There Hale represented that only four of KLB500's eight authorized stations were "in service."

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[17] But see Footnote 13 *supra*, which discredits any contentions made on the basis of that log; also see Tr. 1537, 1541–1544.

[18] Before the inspection the various KLB500 frequencies were monitored. There was no UHF activity on any of the four UHF base frequencies. When Simpson mentioned to Hale that the UHFs had apparently never had any public correspondence on them, Hale assured him that the Commission had been notified of that fact. See Finding para. 20 *supra*.

[19] See Footnote 6 *supra*. It was Hale (not Motorola) who removed the CC 4018C tags and replaced them with CC 4061Cs.

[20] And on January 12, 1978 (one of the inspection days), Mobilfone sent a letter to the Commission giving still a fourth version of why the two KLB500 UHF transmitters had been removed (CCB Ex. 9).

[21] For example, on July 21, 1978, the Common Carrier Bureau sent Hale a letter. There they asked, *inter alia*, for the date each UHF transmitter was installed and tuned. Hale answered on August 7, 1978. He said that "All four transmitters were installed and tuned on April 12, 1976 . . ." See CCB Ex. 15, pp. 2 and 7.

However, shortly thereafter - on August 27, 1977 - Mobilfone amended its 1976 Form L to show that all eight of KLB500's base stations were in service (CCB Ex. 1, pp. 1–2; Tr. 496–497 and 1561–1563).[22]

25. On July 3, 1978, Mobilfone filed an FCC Form L for calendar 1977. There Hale represented that six of KLB500's eight authorized base stations were "in service." On May 3, 1979, he filed an identical report for calendar 1978; on June 30, 1980 he filed an identical report for calendar 1979; and on June 2, 1981, Hale filed an identical report for calendar 1980; namely, that he had six of KLB500's eight base stations "in service."

26. When he was asked about these reports at the hearing, Hale said that "in service" doesn't really mean "in service"; it just means that the stations have been constructed and are therefore capable of providing service (Tr. 498–500; but also see Tr. 1523–1525 and 1538).

Hale's Efforts to Blame Others For His Misrepresentations

27. One of Hale's standard tactics when he must face up to factual inconsistencies is to place the blame for the misrepresentation on someone else.[23] In this proceeding he has tried to blame his misstatements on one of his attorneys (Harold Mordkofsky) and subsequently on his former engineering consultant (Glenn Elliott).[24] The background facts follow.

28. As previously noted (Finding 17 *supra*), when Hale filed his 152.12 MHz application on July 21, 1976, he didn't provide a traffic load study for his four KLB500 UHF channels. Instead he asked for a waiver of that requirement. "However", he said, "should the Commission require a traffic load study it will be supplied promptly upon request." Thus Hale implied that there was public correspondence that would permit such a study to be made.[25]

29. On October 28, 1977, the Chief, Mobile Services denied Hale's waiver request, and ordered Mobilfone to submit a traffic load study for its four KLB500 UHF channels.[26] On November 18, 1977, Glenn

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[22] Doubtless Hale's August 27, 1977 Form L amendment came about as a result of the June 13, 1977 FCC inspection of his El Dorado, Pine Bluffs, and Hot Springs stations. See Footnote 15 *supra*. There it was discovered, *inter alia*, that Hale had submitted inaccurate Form Ls to the Commission. See CCB Ex. 17A.

[23] E.g. see CCB Ex. 15, pp. 9–10 where he blamed Glenn Elliott for previous inaccuracies that had been reported to the Commission; and his April 23, 1982 affidavit (attached to Mobilfone's April 30, 1982 Opposition to Motion to Enlarge, Change and Delete Issues) where he blamed his accountant for his having signed a renewal application for a station (KXX708) he (Hale) didn't own.

[24] Glenn Elliott didn't testify in this proceeding. See FCC 83M-476 released February 9, 1983; also see CCB PFs B16–18.

[25] Keep in mind that later, after he learned that KLB500 was going to be inspected, he sent a letter to the Commission where he admitted that he had never offered commercial service on the four KLB500 UHF frequencies. See Finding 20 *supra*.

Elliott (Hale's consulting engineer) forwarded three copies of a UHF traffic load study to Hale's Washington communication counsel (MC Ex. 8, p. 5).

30. Washington counsel then prepared an amendment that would satisfy the FCC's October 28 request, and on November 22, 1977 they sent it to Elliott and instructed him to have Hale sign and date the amendment, and return it for filing with the FCC. Counsel also noted that the filing date for the amendment was November 28, 1977 (MC Ex. 8, p. 7).

31. According to Hale (see Footnote 24 *supra*)[27], Elliott, then presented him with an amendment for his signature along with a copy of a UHF traffic load study. The study showed customers on all four UHF channels for each of three days. Hale says: that he refused to sign the amendment and on or about November 25, 1977, he called his counsel, Arthur Blooston, and told Blooston that there were no subscribers on the UHF channels; that Blooston told him that he could submit a study showing no subscribers but that the Commission wouldn't look at such a study favorably; and that he told Blooston that he (Hale) would have to decide whether to submit a study showing no customers on the KLB500 UHFs or dismiss his 152.12 MHz application. Hale says he also asked Blooston to return the copy of the traffic load study that Elliott had sent to Blooston.

32. On November 25, 1977, Blooston sent Hale a letter. It reads in pertinent part as follows (MC Ex. 8, p. 8):

> . . .
>
> In accordance with your request, we are returning herewith the traffic load studies for the UHF channels of station KLB500 previously sent to us by Glenn Elliott. You will supply new traffic load studies.
>
> . . .
>
> P.S. We wanted you to know that the Commission staff are now scrutinizing very carefully all traffic load studies and surveys of need and are running their own independent checks of the accuracy of the representations made in such studies or surveys.

This letter suggests that Hale had told Blooston that he was going to submit new UHF traffic load studies, and that Blooston was warning Hale that the representations contained in that study had better be accurate.

33. Three days later (November 28, 1977), Harold Mordkofsky sent a letter to the Chief, Mobile Services Division. There he

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[26] Although the Chief's letter was addressed to Hale's communications counsel, a carbon copy was sent to Hale personally (CCB Ex. 4). So it's difficult to believe that Hale wasn't aware that he had committed himself to providing a UHF traffic load study.

[27] The phrase "According to Hale" has been used not only because Glenn Elliott didn't testify in this proceeding, but also because Hale's version doesn't coincide with the documentary evidence *infra*.

requested a thirty-day extension of time to respond to the Chief's October 28, 1977 letter (Finding 29 *supra*). In support of the request Mordkofsky made the following representation: "While the traffic load study requested is in preparation, it will not be possible to file it within the time presently allotted." Thus Hale reaffirmed the prior representation that there was public correspondence that would permit a UHF traffic load study to be made (CCB Ex. 3).

34. Sometime after December 14, 1977, Hale instructed Blooston to dismiss the 152.12 MHz application (Tr. 459–462; MC Ex. 8, pp. 6 and 9).[28] And on January 3, 1978, after Hale learned that KLB500 was to be inspected, Hale made such a request (CCB Ex. 2), and there acknowledged for the first time that there had never been any public correspondence on the four KLB500 UHF frequencies (see Finding 20 *supra*).

35. On August 4, 1982, Hale exchanged an exhibit which, *inter alia*, discussed this series of events (Findings 28–34 *supra*). There he disclaimed any knowledge of his own representation that "should the Commission require a traffic load study it will be supplied promptly upon request" (MC Ex. 1, p. 5). And on August 30, 1982, he disclaimed any knowledge of the November 28, 1977 representation that a UHF traffic load study was being prepared (MC Ex. 6, p. 1, para. 3, *withdrawn*). When it was called to counsel's attention that Hale was accusing his attorney, Harold Mordkofsky, of having made a misrepresentation to the Commission, Blooston withdrew the exhibit to reform it (Tr. 103–115).

36. On September 27, 1982, Hale executed another affidavit on the subject (MC Ex. 8, pp. 1–4). This time he claimed that the November 28, 1977 letter ". . . was written based upon information supplied not by me, but by my communications consultant, Glenn Elliott."[29] [30]

Hale's Efforts to Get Others to Misrepresent

37. Hale has not only made continuing misrepresentations to the Commission from August 15, 1973 to the present time, and he not

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[28] Hale was also withholding data from his own counsel. See the postscript at the bottom of Blooston's December 22, 1977 letter to Hale (CCB Ex. 8, p. 9). Notice also that Counsel took the precaution of sending that letter to Hale's home address.

[29] As the Bureau correctly notes between August 4, 1982 (when Hale blamed Mordkofsky for the misrepresentation) and September 27, 1982 (when he blamed Elliott), Hale learned that Elliott was outside the reach of the subpoena power and in all probability wouldn't be testifying in this proceeding (Tr. Vol. 4, pp. 138–139; CCB PFs B15-18).

[30] Also see Hale's August 20, 1982, affidavit where he tried to twist around statements that Bureau witness John Max Gavin had made to him in their August 10, 1982 conversation (compare MC Ex. 14, with CCB Ex. 32).

only has attempted to blame others for his own misrepresentations, he has also tried to get others to misrepresent the facts of record.

38. First of all he tried to get two of his own witnesses, Melvin Dunkle and Robert Zicker, to falsely represent certain facts to the Commission.

39. Hale prepared Mel Dunkle's August 16, 1982 sworn testimony (MC Ex. 12). In his affidavit Dunkle purportedly stated that he knew that Hale and Purcell had tested the KLB500 UHF channels in the early spring or summer of 1976 (MC Ex. 12, para. 8).

40. But when he was examined on that fact at that hearing Dunkle said he was referring to technical equipment tests on control links for the VHF channels, and as far as he knew, when he left Hale's employ in December, 1976, none of the KLB500 UHF transmitters had been installed (Tr. 654–656, 659–661, 676).

41. Hale also prepared Robert Zicker's sworn testimony (MC Ex. 13). In his affidavit Zicker said that he had a telephone conversation on the night of August 12, 1982 with Bureau counsel (Ms. Longo). Zicker then purportedly swore that *after* he told Ms. Longo that he was familiar with the equipment which was to be used for the four KLB500 UHF stations, "Ms. Longo advised me that she did not need any more information from me and would not call on me to testify at a hearing concerning the UHF stations for KLB500" (MC Ex. 8, para. 17).

42. When he was examined on his affidavit at the hearing, Zicker said he hadn't discussed testifying in this proceeding with Bureau counsel or told Hale that he had (Tr. 1701–1703; CCB PF B29).[31]

43. Hale's attempts to improperly influence the testimony of others wasn't confined to his own witnesses. In preparing for trial the Bureau learned from certain people that Hale hadn't installed the four KLB500 UHF base stations on or before April 12, 1976, as he had represented he had (see Findings 5–13 *supra*). One of those people was John Max Gavin. As previously noted Gavin had worked as a Technician for Hale from 1961 until May 2, 1980 (see Footnote 8).

44. On August 4, 1982, the Bureau notified Hale that Max Gavin was its witness (CCB Ex. 44; Tr. 1949–1950, 1953–1954). Shortly thereafter, on August 10, 1982, Hale telephoned Gavin. And after he learned that Gavin had told Bureau counsel that only two of the four KLB500 UHF stations had ever been installed, he asked Gavin to meet with him (Hale) and Purcell.[32] That meeting took place on August 11, 1982, and lasted about an hour. At that meeting Hale told

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[31] From the outset of this proceeding Hale has been more than willing to attack Bureau counsel (Ms. Longo). See e.g. Tr. 51–52; also see CCB Ex. 32, p. 1).

[32] Gavin and Purcell had worked together for many years and are good friends. See Finding 15 *supra*.

Gavin that if he (Gavin) testified it would hurt Hale very much, and that he (Hale) tried to refresh Gavin's "faulty" recollection; i.e., he tried to get Gavin to change his story. See Tr. 1171, 1173, 1880–1882, 1947–1948, 1951–1952; MC Ex. 34, pp. 47–48, 56–57; CCB Ex. 32, p. 1).[33]

45. Having failed to get Gavin to change his version of what had transpired, Hale took his deposition on October 5, 1982 (see MC Ex. 34).[34] A short time later Hale's chief technician, and Gavin's longtime friend, John Purcell telephoned Gavin. Purcell says he called Gavin because he'd heard that Gavin had gone through the deposition and he wanted to see how Gavin was doing (Tr. 867–868).

46. During the conversation Purcell told Gavin that his (Gavin's) memory was incorrect on the events surrounding the installation of the KLB500 UHF stations. Gavin admitted that he wasn't sure about some of the dates, and Purcell said, "Max, why don't you just sign an affidavit and just say you can't remember it all, okay?" Gavin replied, "No, I couldn't do that." Then Gavin said, "John, you and I know, down in deep heart that those stations were not put on." Purcell didn't reply (Tr. 867–869, 916–917, 1067–1068 and 1118).[35] [36]

Issue 6 - Mobilfone's UHF Need Issue

47. Under Issue 6 we must determine whether Mobilfone has a need for the UHF frequencies of Station KLB500. In phrasing the issue the way it did the Commission said this (47 FR 11960 *supra*, at para. 20):

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[33] Before the August 11, 1982 meeting, Hale possibly spoke with his counsel about meeting with Gavin. Counsel never advised not meeting with Gavin without first obtaining Bureau counsel's permission (Tr. 1949–1954; CCB Ex. 44; CCB PF B25-26).

[34] This was a lengthy deposition session.

[35] Having failed to get this Bureau witness to change his testimony Hale's counsel, at the hearing, then leveled an irrelevant and unwarranted collateral attack on Gavin's character by accusing him of being a racist (Tr. 1084–1089); and of being untruthful to his wife about the hours he worked for Hale Tr. 1081–1083). Because of these attacks the Presiding Officer closely observed John Max Gavin's demeanor over the three days he testified (see Tr. Vols, 8, 9, and 10). Despite what Hale had put him through Gavin was genuinely distressed that his (Gavin's) testimony would harm Hale. The Presiding Officer is satisfied that although he misspoke on one or two occasions, and although he had a propensity to answer questions too quickly; i.e., without listening closely to the questioner's wording, the crux of Gavin's testimony was accurate, truthful, and can be relied upon (CCB PFs 88–94).

[36] As previously noted (Findings 14–16 *supra)* the crux of Gavin's testimony has been corroborated by documents obtained from Hale's files. But, in addition, another former Hale employee, Paul Grist, has substantiated Gavin's version of what transpired (CCB PFs A5, A8, A57, and A76). It should also be noted that on June 11, 1982, Hale initiated a lawsuit against a competitor, Twin Cities Beepers. Paul Grist is now employed by Twin Cities (CCB PFs A89 and A96). During his testimony (Tr. Vol. 10) the Presiding Officer also observed Paul Grist's demeanor. He is satisfied that Paul Grist has been a truthful witness. See CCB PFs 96.

> "... A question is raised whether Mobilfone has a need for the UHF frequencies for this station. As indicated above, Mobilfone never put its four UHF channels into public service. When the FOB inspected the facilities, two of the UHF transmitters were missing and control lines were not connected to the remaining two UHF transmitters. Indeed, until the inspection of these facilities, Mobilfone apparently took no affirmative steps to remedy any problems it might have been experiencing with these frequencies on these circumstances, we question whether Mobilfone has any need for these UHF frequencies ...."

48. To meet Issue 6, Mobilfone presented (1) a traffic load study which included the two KLB500 UHF channels which are currently providing service to subscribers (Channels 25 and 28)[37] as well as the four currently authorized VHF channels (Channels 1,5, 11 and 13);[38] and (2) a four channel UHF need survey conducted by Paul Baker, Mobilfone's General Manager.[39] The following Chart summarizes the results of the traffic load study:

CHART

Channel Number	*Frequency*	*Entitled Mobile Units*[40]	*Average Bouncing Busy Hour Minutes*
VHF 1	152.03 MHz	143	57
VHF 11	152.18 MHz	143	56
VHF 5	159.09 MHz	178	59
VHF 13	152.21 MHz	80	56
UHF 25	454.125 MHz	6	50
UHF 28	454.200 MHz	6	48

49. In conducting his public need survey Baker used a method that had proven in the past to be a reliable indicator of actual demand for service in the past (Tr. 1774–1775). Baker found a need for 188 units,[41] although it appears some of the survey respondents were requesting service beyond the 39 dBu contour. In addition, orders representing 68 units requested that service be provided to Conway or Benton - an area where Baker admits service would be sketchy and unreliable because their outskirts are on the perimeter

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[37] Mobilfone *first* offered public service on the two UHF channels in April, 1982 (Tr. 1810–1811).

[38] See MC Ex. 4.

[39] See MC Exs. 3 and 7.

[40] All pending requests for service which Mobilfone has are held for the UHF four-channel system since the VHF frequencies are operating at a very high usage and are busy for long periods of time (MC Ex. 4, p. 5).

[41] These are *non-binding* requests for service. No findings have been made on the conclusion Mobilfone submitted at page 147, Conclusion 68 because the Presiding Officer isn't satisfied that calculation (b) is accurate.

of the reliable service contour. Thus the maximum held orders Mobilfone could claim would be 120.

Conclusions of Law

The Misrepresentation and Lack of Candor Issues[42]

1. On August 15, 1973, Otis Hale embarked on an effort to keep DPLMRS competition out of the Little Rock, Arkansas market. He decided, among other things,[43] to stockpile (or warehouse) four UHF frequencies that were available for use there; i.e., 454.025 MHz, 454.125 MHz, 454.200 MHz, and 454.300 MHz.

2. In order to implement his stockpiling scheme, Hale made a series of misrepresentations to the Commission. On May 19, 1976, he told the Commission that he had completed the installation of the four UHF base transmitters on April 12, 1976. He hadn't. He hadn't even started constructing any of them.

3. Hale represented to the Commission that the four UHF transmitters were ready for operation. They weren't. He represented that he had installed four Motorola Type Accepted 90-watt CC 4061 transmitters. He not only hadn't installed any CC 4061s, he didn't even own any. Instead he purchased entirely different transmitters; i.e., lower-powered 60-watt Motorola CC 4018s, and placed CC 4061 identification plates on them in order to deceive the FCC.

4. He told the Commission that the KLB500 UHF frequencies were ready for public correspondence on an unlimited time basis. In fact, no public correspondence was offered on *any* KLB500 UHF transmitters until April 1982 - after this case was designated for hearing, and Hale's character had been placed in issue. Even then public correspondence occurred on only two UHF frequencies.

5. Having implemented his stockpiling scheme Hale then had to continue lying up through the Commission's January 1978 inspection and through the hearings in this case. As he had stockpiled the

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[42] Since the record so overwhelmingly demonstrates that Otis Hale does not possess the requisite character qualifications to be or remain a Commission licensee, no conclusions are needed on Issue 6. Stated another way, whether Hale has shown that he needs the four KLB500 UHF frequencies is irrelevant. See e.g. *Leo Joseph Theriet*, 32 FCC 599 (1962) at para. 5. However, note that findings of fact have been made on Issue 6 (Findings 47–49 *supra*). It is only the conclusions that aren't necessary. See *Edina Corp.*, 45 FCC 796 (1963) at para. 4; *WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; and *Sayger Broadcasting Co.*, 32 FCC 496 at Footnote 2.

[43] The phrase "among other things" has been used because this record reflects that Hale may have used other devices to thwart or stifle competition in the Little Rock area. For example, Hale has been accused of filing a "strike" application (Footnote 10 *supra*); and he has initiated a lawsuit against his competitor, Twin City Beepers (MC Ex. 16 and Footnote 36 *supra*). Hale has also been accused of engaging in an unauthorized transfer (see Motion to Enlarge, Change, and Delete Issues filed by Grant County on April 5, 1982, and Footnote 23 *supra*); and, of course, he had to answer to the anti-competitive allegations in the *Mahaffey* proceeding (see Footnotes 13 and 15 *supra*).

UHF frequencies he was now forced to stockpile the misrepresentations underlying his scheme. Stated another way, in an effort to cover up his stockpiling, Hale had to pile one misrepresentation on top of another. It wasn't long before he had a whole network of fabrications.

6. For example, in his 152.12 MHz VHF application that Hale filed on July 21, 1976, he represented that if the Commission ask for a KLB500 UHF traffic load study it would be supplied promptly. He had to know this was a lie. He knew that there was no way he could supply a traffic load study, since the UHF 90-watt transmitters hadn't even been purchased - let alone installed.

7. Not only is Hale guilty of continuing deception, he is incapable of facing the music when he is caught lying. When he is trapped in the web of his own falsities it doesn't faze Hale one bit. He simply blames the people around him for his misstatements. When he signed a renewal application for a station he didn't own, he blamed his accountant. When, on November 28, 1977, he falsely represented that he had a KLB500 UHF traffic load study partially prepared, Hale first placed the blame on one of his attorneys, Harold Mordkofsky. When that backfired, he then transferred the blame to his former engineering consultant, Glenn Elliott.

8. Moreover, when his candor was called into issue, Hale tried to get others to support his falsifications. He tried to use a former employee, Mel Dunkle to corroborate his lie that he (Hale) had tested the KLB500 UHF channels in the early spring or summer of 1976. He also prepared false testimony in affidavit form for another former employee, Robert Zicker. He wanted to use that false swearing to support one of his several attacks on Bureau counsel.

9. Hale's efforts to cover up his lies reached its apex in his efforts to tamper with one of the Bureau's witnesses in this case - John Max Gavin. After Hale learned that Gavin had told Bureau counsel that Hale had belatedly tried to install two unauthorized UHF transmitters on KLB500, Hale set up a meeting with Gavin. And at that meeting he tried to get Gavin to change his story.

10. When that failed, Hale's Chief Technician, and Gavin's longtime friend, John Purcell telephoned Gavin. Purcell suggested that Gavin develop a faulty memory about the past events, and sign an affidavit saying he couldn't remember.

11. Based on the foregoing (Conclusions 1–10 *supra*) it is patently obvious that Otis Hale doesn't possess the requisite character qualifications to be a Commission licensee for any one of a number of reasons. He has deliberately and continuously lied to the Commission. He lacks candor. He has solicited false testimony from others. He has mislabeled machinery in an effort to deceive the Commission. And he has tampered with a government witness in an effort to cover-up his past misrepresentations. See *Palmetto Broadcasting Co.*, 33 FCC 250, 253 (1962); *Tipton County Broadcasters*, 37 FCC 191, 196

(1964); *Radio Broadcasters, Inc.*, 23 FCC 2d 209, 214 (1970); *U.S. v. Abrams*, 427 F.2d 86, 90 (1970) *cert. den.* 400 U.S. 832 (1970); *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1040–1042, 1046–1047 (1972); *Grenco, Inc.*, 39 FCC 2d 732 (1973); *Chronicle Broadcasting Co.*, 40 FCC 2d 775, 792–802 (1973); *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157 (1976) *affirmed* 627 F. 2d 240 (1980) *cert. den.* 449 U.S. 834 (1980); *WNST Radio*, 70 FCC 2d 1036 (R. Bd. 1978); *U.S. v. Baker*, 611 F.2d 964, 966, 968 (1979); *U.S. v. Tedesco*, 670 F.2d 902, 904 (1980) *cert. den.* 452 U.S. 962 (1981); *Pass Word, Inc.*, 76 FCC 2d 465, 518–520 (1980) *affirmed* 673 F.2d 1363 (1982), *cert. den.* 74 L. Ed 82 (1982); and *RKO General Inc. v. FCC*, 670 F.2d 215, 233–236 (1981).

Ultimate Conclusion

12. We must now determine, based on the evidence adduced in this case, what actions with respect to the *above-captioned applications* would best serve the public interest, convenience and necessity. See Finding para. 2, Issue 10 *supra* (underlining supplied).

13. The Bureau recommends denial of the Mobilfone renewal application for the KLB500 UHF channels, denial of the relocation application, and return of Hale's other renewal applications to the processing line for appropriate action in light of the serious misconduct demonstrated in this record. It bases this recommendation on its interpretation of para. 28 of the Designation Order (see 47 F.R. 11960 published March 19, 1982).

14. The Bureau's recommendation is rejected. It has erroneously construed the Designation Order's language. See Footnote 1 *supra*. In the first place para. 28 is moot. Its terms were to be applied "in the event that Issue 3 is resolved adversely to Grant County's and LRRTC's qualifications prior to Phase II. . . ." That contingency never occurred. See FCC 82M-2328 released July 28, 1982. Therefore the case reverted to normal procedures,[44] and the Presiding Officer has before him *all* the captioned applications.

15. In the second place the Commission's suggested[45] Phase 1-Phase 2 bifurcation was never adopted. From the outset we have included designated Issues 6–7 as part of the Phase 1 hearings.[45] So it is the Presiding Officer's obligation to consider and rule on *all* the applications that the Commission placed in hearing.[46]

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[44] No bifurcated Initial Decisions were issued. The parties recommended that evidence be taken on all the issues, and that a single set of Proposed Findings of Fact and Conclusions of Law be submitted by each party and that one Initial Decision be issued (Tr. 1619–1622).

[45] See 47 F.R. 11960 *supra*, at paras. 2 and 24, and compare that suggested procedure with the one actually adopted at FCC 82M-0807 released March 12, 1982.

[46] This is not to say, that if the Presiding Officer determined that circumstances warranted it, he could grant some of the renewals or perhaps even adopt the Bureau's suggestion that certain of the captioned applications be returned to the Processing Line. Here circumstances do not so warrant.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion:[47]

Otis L. Hale d/b/a Mobilfone Communications' renewal application for Station KLB500 (File No. 23697-CD-R-79) IS DENIED;

Otis L. Hale d/b/a Mobilfone Communications' renewal application for Station KQZ752 (File No. 23700-CD-R-79) IS DENIED; and

Otis L. Hale d/b/a Mobilfone Communications' application for a Construction Permit to relocate 454.025 MHz and 454.300 MHz channels of Station KLB500 (File No. 20741-CD-P-(2)-78) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

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[47] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release.

FCC Jurisdiction
Jurisdiction

Report adopted re primary jurisdiction referral of claims against government defendant arising from the inclusion in NAB TV Code of the "Family Viewing Policy."
-NAB TV Code

FCC 83-414

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Primary Jurisdiction Referral Of Claims Against Government Defendant Arising From The Inclusion In the NAB Television Code Of The "Family Viewing Policy."

REPORT

(Adopted: September 9, 1983; Released: September 23, 1983)

BY THE COMMISSION:

The question before the Commission is whether certain actions of the Commission through its Chairman violated the First Amendment and the Administrative Procedure Act.[1]

Initially we address the question of the appropriate procedure for the Commission to follow in this matter. At this point, we see nothing that can be gained by further evidentiary hearings or by oral argument. We have available to us an extensive factual record based on testimony that has been given under oath and is thus highly reliable. The basic facts adduced in the district court are largely beyond dispute, although the inferences to be drawn from those facts are, of course, subject to considerable dispute. It would be unlikely that further proceedings would add significantly to our understanding of the facts or law in this case. Accordingly, we rely in this report on the factual record developed in the district court proceeding as the basis for our conclusions concerning the legal significance of the activities surrounding the adoption by the NAB of the family viewing amendment to its Television Code.

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[1] On April 8, 1975, the Television Bord of Directors of the National Association of Broadcasters adopted an amendment (the "family viewing amendment") to the NAB Television Code, which provided generally that the first hour of television network prime time and the preceding hour would not consist of programming unsuitable for viewing by the entire family. A group of individuals and companies involved in the production and sale of programs for television challenged this amendment in a lawsuit in federal district court against the Commission, each individual Commissioner, the three major commercial television networks, and the NAB. The district court held that the family viewing amendment had been adopted as a result of coercion exerted by the FCC through its chairman, and that such conduct violated the First Amendment and the Administrative Procedure Act. In addition, the court held that the actions of the networks and the NAB constituted "government action" that violated the First Amendment. *Writers Guild of America West, Inc. v. FCC*, 423 F.Supp. 1064 (C.D. Cal. 1976). On appeal, however, the court of appeals concluded "that this case raises issues of major significance to the administration of the regulatory scheme pertaining to the broadcast media that properly rest within the primary jurisdiction of the FCC . . . ." *Writers Guild of America West, Inc. v. American Broadcasting Cos., Inc.*, 609 F.2d 355, 358 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). The court of appeals vacated the district court judgment with instructions that the claims against the

After careful consideration of the plaintiffs' claims against the FCC and the seven named commissioners, the record adduced in the district court, the decisions of the district court and the court of appeals, as well as the comments filed upon remand at our request, we have concluded that the actions which formed the basis of the complaints against the Commission's former chairman and the other commissioners named in the complaint were neither unlawful nor improper. The record developed in the district court makes clear to us that the NAB family viewing policy was not the child of coercion exercised by former Chairman Wiley or the Commission. Rather, the record supports the conclusion that the decision to adopt the family viewing amendment, although undoubtedly motivated by a variety of relevant considerations, was the result of a voluntary decision by the three commercial television networks, the NAB, and the NAB Code Review Board.

I. *BACKGROUND*

The NAB Television Code[2] was first developed in 1952. Until its elimination in 1983, it was administered by the NAB Code Review Board, which consisted of representatives of individual stations and of the networks. The Board was responsible for interpreting the Code and initially considering amendments to the Code. Amendments were ultimately adopted, modified or rejected by the NAB Television Board of Directors, which also consisted of station and network

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government defendants be referred to the FCC for resolution in administrative proceedings. In a March 1981 order, the district court referred the plaintiffs' claims to the Commission.

[2] The National Association of Broadcasters is a trade association of commercial television and radio station owners and operators. The membership includes over 3500 radio stations and 500 television stations. However, many broadcasters are not members of the association, and membership is not a prerequisite to acquisition or renewal of a station's license or network affiliation. Moreover, withdrawal from the NAB or, prior to its elimination, from subscription to the NAB Code, has no adverse impact on the station's ability to have its license renewed.

representatives. Final responsibility for the Code rested with the Television Board. The Code's standards provided guidance which each NAB member applied using his own judgment based on his experience and familiarity with his community.[3]

From its inception, the Code recognized broadcasters' responsibilities to present certain themes with greater sensitivity and with regard to their potential effects on children. The early versions of the Code forbad offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience. Beginning in 1954, Congress began to examine periodically the effect of excessively violent programming on children.[4] The industry responded to Congressional concerns primarily by revising provisions of the Code from time to time to give its subscribers more detailed guidelines concerning violent or sexually-oriented programming than had previously been available.[5]

Despite these self-regulatory efforts, concern about excessive violence continued. In 1972 the Surgeon General reported to Congress his conclusion that televised violence does have an adverse effect on certain members of society.[6] In 1974 the FCC received nearly 25,000 complaints about violent or sexually oriented programming.[7] In June 1974, the House Appropriations Committee stated that "[T]his is the fifth consecutive year the Committee has included language in its report expressing concern with the effect of violence and questionable programming on children." The Committee directed the Commission "to submit a report to the Committee by December 31, 1974, outlining the specific, positive actions taken or planned by the Commission to protect children from excessive violence and obscenity."[8] In addition, broadcast station owners themselves became concerned about the increasing level of violence and sexual material on network programs as they experienced a significant increase in viewer complaints, just as the FCC had. *See, e.g.*, Tr. 4263, *et seq.*[9]

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[3] At the time of the adoption of the family viewing amendment, members of the NAB were required to subscribe to the Code. That requirement was subsequently changed in 1977 to permit membership in the NAB without subscription to the Code.

[4] *See Report on the Broadcast of Violent, Indecent, and Obscene Material,* 51 FCC2d 418 (1975) (hereafter *Report*); *Writers Guild of America v. American Broadcasting Companies, supra,* 609 F.2d at 359 n. 8.

[5] For example, the first edition of the Code, in 1952, advised broadcasters to exercise "particular restraint and care in crime or mystery episodes involving children or minors." Moreover, this policy of sensitivity to younger viewers applied to "programs of all sorts which occur during the times of day when children may normally be expected to have the opportunity of viewing television . . . ." In 1963, the guidelines were revised to include the following provision: "[T]hose programs which might be reasonably expected to hold the attention of children and which are broadcast during times of the day when children may be normally expected constitute a substantial part of the audience should be presented with due regard for their effect on children."

[6] *See generally, Hearings on the Surgeon General's Report before Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 2d Sess. (1972).

[7] *See Report, supra,* 51 FCC2d at 418–19.

In response to the mounting pressure to excise sexually explicit and violent programs from the air during those hours when children normally watch television, then FCC Chairman Richard E. Wiley encouraged action within the industry by means consistent with his belief that formal FCC action to restrict or otherwise regulate television programming based on its violent or sexually-oriented content would be of doubtful validity under the First Amendment and Section 326[10] of the Communications Act.[11]

Chairman Wiley was of the view that public opinion was becoming so vociferous against sexually explicit and violent programming during the early evening that some form of governmental action, even if only an inquiry, would be almost inevitable if the broadcasters did not exercise restraint. Chairman Wiley therefore sought to convince the industry of the desirability of voluntary action. He focused the industry's attention on excessive violence and sex on television, explained that the FCC was reluctant for legal and policy reasons to seek to promulgate rules, he reminded broadcasters of their responsibilities to the public, and he urged industry self-regulation. In addition, Chairman Wiley suggested that if self-regulation proved unsucessful, the FCC might be forced to consider some action such as an administrative inquiry, although staff members and industry representatives (including the presidents of the networks) and Chairman Wiley generally adhered to the position that the FCC did not have "any legal or constitutional authority to adopt specific regulations." (Tr. 3462).[12] For these reasons and because of the heightening public and Congressional concern, he urged the networks to develop their own standards and to issue public statements of their policies.[13]

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[8] H.R. Rep. No. 1139, 93d Cong., 2d Sess. 15 (1974). The Senate Appropriations Committee joined in the request. *See* S. Rep. No. 1056, 93d Cong., 2d Sess. 10 (1974). The time for filing the report was later extended to February 15, 1975.

[9] References to "Tr. __ " are to the pages of the transcript of the district court trial.

[10] Section 326 provides:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by radio stations, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.

[11] On at least one occasion, Chairman Wiley expressed the belief that the FCC did not have "any regulatory possibilities that would be statutorily or constitutionally possible." (Tr. 3453).

[12] *See also* Tr. 1753, 1756 and discussion at p. 7, n. 16, *infra*.

We find that the networks, in response to the concerns expressed by Congress, Chairman Wiley, and countless viewers, among others, were motivated to consider self-regulation (1) in order to avoid the possibility of some form of government intervention—whether by the FCC or Congress—and (2) by business considerations. CBS proposed that the NAB Code be modified to ensure that the first hour of network prime time would contain no program unsuitable for general family viewing. ABC and NBC quickly announced adoption of similar policies.[14]

On February 4, 1975, the NAB Code Review Board met to consider CBS' proposal, and voted to recommend its adoption. On April 8, 1975, the NAB Television Board of Directors formally adopted the family viewing amendment.[15]

II. *DISCUSSION*

It is our judgment that the Commission under Chairman Wiley acted properly in its attempt to focus the broadcast industry's attention on excessive violence and sex on television and to urge improved industry self-regulation to forestall the demand for governmental action. Chairman Wiley did little more than point out that if the industry did not engage in effective self-regulation, the FCC might be forced by the pressure of Congress and of public opinion to consider some action such as an administrative inquiry. As the court of appeals summarized (609 F.2d at 359–60):

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[13] *See* Tr. 3456, 3460, 3462. These meetings and subsequent actions are described in more detail in the Commission's Report to Congress. *See Report, supra*, 51 FCC2d at 420–24. *See also, Writers Guild of America v. American Broadcasting Cos., supra*, 609 F.2d at 366–370.

[14] *See*, e.g., Vol I, p. 61, Vol. XIV, pp. 3159–60.

[15] The family viewing amendment to the NAB Code stated in full:

> Additionally, entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime time periods contain material that might be disturbing to significant segments of the audience.
>
> These advisories should be presented in audio and video from the beginning of the program and when deemed appropriate at a later point in the program. Advisories should also be used responsibly in promotional material in advance of the program. When using a advisory, the broadcaster should attempt to notify publishers of television program listings.
>
> Special care should be taken with respect to the content and treatment of audience advisories so that they do not disserve their intended purpose by containing material that is promotional, sensational or exploitative. Promotional announcements for programs that include advisories should be scheduled on a basis consistent with the purpose of the advisory.

NAB Television Code, 18th ed (June 1975). The enforcement of the family viewing amendment was suspended following the district court decision. *See Broadcasting*, Nov. 15, 1976, at 38. The entire NAB Television Code was eliminated in January, 1983. *See Broadcasting*, January 24, 1983, at 39.

> Chairman Wiley's campaign ultimately involved: (1) five meetings between himself and/or members of the Commission staff and industry representatives at which various proposals for dealing with the problem of televised sex and violence were discussed; (2) three public speeches by Chairman Wiley in which he exhorted the industry to undertake its own action but indicated that unless some action were taken, the government might well be forced to become formally involved with the problem; (3) several telephone conversations between Chairman Wiley and various network executives; and (4) suggestions by Chairman Wiley to various NAB representatives that the NAB expedite its consideration of a proposal for a Code amendment incorporating the family viewing policy.

When this "campaign" is considered in the context of repeated statements by Chairman Wiley and the Commission that government regulation in this area would be undesirable and of dubious validity, there is little basis for the proposition that the actions of Chairman Wiley could have been intended or perceived as coercion, threats or intimidation.[16] As Chairman Wiley testified - making threats "would have violated every precept I had about the responsible role between Government and industry." (Tr. 3516).

Chairman Wiley's views of the networks' responsibilities to regulate the amount of sex and violence depicted during the early evening hours was perhaps best summarized in an address to the Illinois Broadcasters Association in October 1974:

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[16] Chairman Wiley repeatedly stated in his meetings with network executives that the Commission did not have "any viable regulatory possibilities that would be statutorily or Constitutionally possible" (Tr. 3453), that the FCC "didn't have any legal or constitutional authority to adopt specific regulations" (Tr. 3462; see also Tr. 1753, 1756), and that the networks' efforts to deal with the problem of excessive violence on television "should not be done in response in any way to Government censorship" (Tr. 3498; see also Tr. 1818). And in testimony before Congress, Chairman Wiley had stated: "I am not so confident that we can simply affect the content of programming and advertising as you and I might like to do, because I do not think that is consistent with the Act nor with my understanding of the role of government." *Hearings Before the Subcommittee on HUD-Space-Science-Veterans of the House Committee on Appropriations*, 93d Cong., 2d Sess. 64 (1974). The district court itself noted that Chairman Wiley "believed that the staff proposals for formal Commission action presented severe First Amendment and Section 326 problems," and that "Chairman Wiley's reluctance to enter the field had . . . stemmed from a deep belief that constitutional, statutory and prudential considerations dictated that government had no proper role to play." 423 F. Supp. at 1096–97. Admittedly, Chairman Wiley's statements might have been received with a certain amount of uncertainty in view of some equivocal statements as to whether or not the FCC might seek to take regulatory action, but the Commission publicly stated in its February 1975 Report to Congress that "[r]egulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems." 51 FCC2d at 420. *See also* Vol. I, pp. 107, 110, 133–134, 146–47. Thus, although the broadcasters might possibly have been confused as to exactly what action, if any, the FCC or the Congress might take, they were not likely to be coerced by Chairman Wiley's statements.

> [A]s the Supreme Court has made abundantly clear, broadcast licensees have a special responsibility to the American people—a responsibility which requires, in my opinion, considerable self-analysis, self-restraint and, ultimately, self-regulation. And, if self-regulation does not work, governmental action to protect the public may be required—whether you like it or whether I like it.

When Chairman Wiley's actions are examined in the context of the many and varied influences which were present at the time the NAB decided to adopt its Family Viewing Amendment[17], it seems even more clear that the decision to adopt the Amendment was not made as a result of coercion on Chairman Wiley's part. It would be impossible to calibrate precisely the relative influence on the members of the NAB of these competing considerations, and indeed the Supreme Court has often indicated that an inquiry into the purposes and motives of legislative bodies "is often an unsatisfactory venture",[18] for "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ."[19] Because the NAB functions like a legislative body, with each member being motivated to cast his vote by differing and sometimes competing concerns, the analysis of the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*[20] is particularly apposite:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

In *Arlington Heights*, the Supreme Court stated that in order for there to exist a legally cognizable nexus between an action which is alleged to be improper and liability for a decision resulting therefrom, plaintiffs must demonstrate that the action was the "dominant" or "primary" reason for the decision.[21] Given the hue and cry that precipitated the adoption of the Family Viewing Amendment, it would ignore reality to conclude that Chairman Wiley did more than convey and emphasize to the industry expressions of concern shared by Congress and the public at large. Indeed Chairman Wiley's statements amounted to little more than reiterations of what the industry could not have failed to perceive on its own.

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[17] *See* discussion at *3–5, supra.*

[18] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 51 U.S.L.W. 4444, 4456. (1983).

[19] *U.S. v. O'Brien*, 391 U.S. 367, 383–384 (1968).

[20] 429 U.S. 252, 265 (1977).

[21] *Id.* at 265.

In addition to the considerations mentioned previously, the broadcast industry was probably especially alert to the possibility of Congressional action because experience with the statutorily-imposed ban on cigar and cigarette smoking had recently spotlighted the advantages of self regulation over statutorily imposed bans. Within a year of the publication of the Surgeon General's Advisory Committee report on the effects of smoking on health,[22] Congress enacted the Federal Cigarette Labelling and Advertising Act[23], which required cigarette labels and advertisements to carry health warnings. In 1967 the FCC extended the Fairness Doctrine to require advertisers of cigarettes to present the point of view that cigarettes are unhealthy.[24] In spite of these measures, the public outcry against the proliferation of cigarette advertisements on television became so vociferous that Congress banned cigarette advertisements altogether.[25] This episode highlighted for the broadcast industry the ever-present possibility of Congressional action.

That the prospect of FCC action was not determinative in shaping CBS's or the other networks' vote on the family viewing amendment was admitted by CBS President Arthur Taylor: "Now, certainly, the whole aspect of Congressional pressure was part of that motivation [to enact the family viewing policy]. One can't rule that out. I wasn't worried nor was anyone worried about what the FCC did. The FCC does not have jurisdiction in this area. If they did, we would have won it, I think, in the courts, in the Appeals Court or in the Supreme Court." (Tr. 3943–44).

It is our judgment that Chairman Wiley did not act improperly in his dealings with the networks and the NAB; to use the metaphor employed by the Court of Appeals, Chairman Wiley properly walked the "tightrope" between permissible jawboning (609 F.2d 393) by a public official and harassment of vulnerable regulatees.[26] Government action of the sort engaged in by Chairman Wiley is not inherently improper.[27] Such action may become offensive on constitutional grounds only when it involves an element of coercion. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963).[28] As indicated

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[22] *See* H. Rep. No. 449, 89th Cong. 1st Sess, 1965 U.S. Code Congressional and Administrative News 2350.

[23] 15 U.S.C. § 1331 *et seq.*

[24] Television station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 FCC 2d 921 (1967). For a detailed discussion of the constitutionality of that decision, *see Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[25] 79 Stat. 283, P.L. 91–222 § 2, codified at 15 U.S.C. § 1335.

[26] Mr. Geller suggested in his comments that the determinant of whether "jawboning" or other informal activity is lawful is whether the underlying goal that the efforts are aimed at achieving is in an area where the Commission has authority to adopt regulation. He employs this analysis to distinguish the "jawboning" sanctioned by the D.C. Circuit in *Action for Childrens Television v. FCC*, 564 F.2d 458, 473 n. 27 (1977) from Chairman Wiley's "jawboning" that was condemned by the district court in this case. *See* Geller Reply Comments at 3–7. This approach is far too simplistic, for, even if the subject matter is clearly within the Commission's authority, "jawboning" could be abused if used in a threatening

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or coercive manner. Moreover, the very purpose of employing "jawboning" and other informal efforts to encourage industry self-regulation in the broadcast area is because the legal and policy questions presented by virtually any government regulation are so difficult and maintenance of a proper balance between public accountability and private control of broadcast stations is so sensitive. As the court of appeals noted here: "[I]nformal discussions between the Commission and members of the industry that lead to self-regulation constitute but one aspect of the ongoing effort by both the government and the licensees to negotiate the regulatory 'tightrope' on which they confront one another." 609 F.2d at 364. In this respect we distinguish those cases which involve the finding of behavior that, under the Constitution, the Government cannot encourage or support. These have primarily involved racial discrimination issues. *See, e.g., Norwood v. Harrison*, 413 U.S. 455 (1973), *Adickes v. S.H. Kress & Co., supra*, 398 U.S. 144; *United States v. Price*, 383 U.S. 787 (1966); *Robinson v. Florida*, 378 U.S. 153 (1964). Here a broadcaster's right to restrict televised sex and violence is not only an affirmative social policy but a practice that is itself constitutionally protected. While we believe that the channel of permissible FCC participation in licensees' programming judgments is tightly constricted by the First Amendment and the Communications Act, it is an area in which the Commission may play some role.

[27] In any event, even in expressing his concerns and attempting to focus industry attention on the issue of violent and sexually-oriented programming, Chairman Wiley was conducting, as he described it, a "personal initiative" (Tr. 3504) and did not purport to speak for the entire Commission. A collegial body like the FCC does not make policy through a single Commissioner, even where he is the Chairman. *See WIBC, Inc. v. FCC*, 259 F.2d 941, 942–43 (D.C. Cir.), *cert. denied*, 358 U.S. 920 (1958); *NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 724 (6th Cir. 1943). None of the other Commissioners was present at any of the meetings, nor were they consulted with regard to them; they were merely "briefed" informally after the fact. (Tr. 3504, 3457). There is no record of any Commission delegation or direction to Chairman Wiley to pursue a family viewing policy through informal channels on behalf of the Commission. Official Commission actions, including Commission directions to individual members or to the staff to take particular action on a delegated basis, must be reflected in an order of the Commission or in the minutes of a Commission meeting. *See* 47 U.S.C. § 155(d). No document or minute entry directing the Chairman to act exists. Nor is there any evidence that Chairman Wiley ever represented that a majority of the Commission would take action against broadcasters if they did not act voluntarily. Since Chairman Wiley was not acting in behalf of the Commission, the likelihood of any perception on the part of the broadcaster of coercion is remote at best.

[28] We are unable to find any basis for the district court's conclusion that Chairman Wiley's actions at issue in this matter in any way resembled the actions at issue in *Bantam Books*, in which the Rhode Island Commission to Encourage Morality in Youth issued "orders" to distributors of publications that the Commission had found "objectionable" threatening criminal prosecution for lack of "cooperation" with the Commission. The Commission in addition advised distributors that local police had been provided copies of the orders and, in fact, local police generally acted in concert with the Commission by visiting distributors who had received the orders. The Court observed in *Bantam* that "[p]eople do not lightly disregard public officers' . . . threats to institute criminal proceedings against them if they do not come around . . . ." 372 U.S. at 68. This is a far cry from Chairman Wiley's urging the broadcast industry to do "something." The only specific actions ever suggested were: (1) the issuance of a policy statement by the Commission that

earlier, we find no element of coercion in the adoption of the family viewing amendment.

In sum, we find that the factors which played a role in the NAB vote on the family viewing amendment included: pressures that the networks and the NAB perceived from Congress; the growing complaints from television viewers; the growing complaints from network affiliate stations; Chairman Wiley's messages; and the independent judgment of network executives that programs dealing with sex and violence had simply gone too far.[29] Moreover, even the district court recognized that broadcasters "freely chose" to adopt the family viewing amendment (423 F. Supp. at 1158) and that Chairman Wiley's "basic message" was simply that "something had to be done to minimize the depiction of sex and violence as well as the use of objectionable language on television in the early evening hours." (*Id.* at 1104).

Our examination of the record in this matter leads us to conclude that the networks would not have been unable or unwilling to resist an effort by Chairman Wiley to have them do something which they otherwise did not want to do.[30] To the contrary, it is our conclusion that the networks' decision to support adoption of the family viewing amendment reflected their independent judgment of the best course for their companies in light of the many pressures they faced to do something about a perceived problem.[31] Discussions between mem-

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might lead to hearings on the subject of sex and violence on television (423 F. Supp. at 1149); (2) that if the industry did not do something, Chairman Wiley "would go to the 'court of public opinion'" (*Id.* at 1106); (3) that if another industry association did not support the family viewing amendment, "the Chairman would report the results to Congress." (*Id.* at 1119); (4) the inclusion of a question on the license renewal form regarding a station's policies with respect to this type of programming—a suggestion that was immediately withdrawn by Wiley (*Id.* at 1101; Tr. 3467, 3788).

[29] The district court observed that "[t]he depiction of violence on television has been a continuing source of congressional and public concern for more than two decades" (423 F. Supp. at 1094), that the public concern had become a "public outcry" (*id.*) and that broadcasters were well aware of this concern (*id.* at 1100–11).

[30] Many years of dealing with the three commercial television networks give us special appreciation of the fact that neither they nor their executives are intimidated by speeches of, phone calls from, or meetings with FCC members, including the Chairman. The networks have in the past displayed a fierce resolve to fight Commission actions that they perceived as intrusive, or potentially intrusive, on their first amendment rights. *See e.g., CBS Inc. v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *N.A.I.T.P.D. v. FCC*, 516 F.2d 526 (2d Cir. 1975); *National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated*, 516 F.2d 1180 (1975), *cert. denied*, 424 U.S. 910 (1976); *CBS v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[31] The broadcast industry, along with every other industry subject to substantial government regulation, regularly faces such pressures and frequently decides voluntarily to address the problem in question rather than to risk the imposition

bers of a regulatory body and a regulated industry are common and often lead to voluntary efforts to address a problem. Thus, Chairman Wiley's direct contacts with the broadcast industry in which he expressed his views regarding a need to address the problem of excessive sex or violence did not arouse any apprehensions or sense of overbearing that might have obtained if irregular mechanisms were employed to communicate with the industry.

Voluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem. Recently such practices have received express congressional sanction.[32]

III. *CONCLUSION*

Our view of the evidence in this matter leads us to conclude that former Chairman Wiley's efforts to focus the networks' attention on their public interest responsibilities did not involve improper pressure, threats or coercion; as such, his actions, while plainly government action, were not offensive on first amendment grounds. To the contrary, the NAB and the networks "freely chose" to adopt the family viewing amendment for a variety of reasons which they could properly take into account.

Apart from the particular facts that gave rise to the family viewing litigation, it is important that we address two related issues here. First, we reaffirm the position of Chairman Wiley,[33] that this Commission has no intention of involving itself in program regulation without complying with the notice and comment requirements of the Administrative Procedure Act.[34] We do not believe any such regulation to be permissable under either the First Amendment or Section 326.

Secondly, we do not believe that there is anything inherently improper about "jawboning", which the court of appeals correctly observed is "a technique of governing . . . that under one name or another has long been in use in government generally." 609 F.2d

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of inflexible government regulation—by rule or statute—or to risk the economic damage to their business that may result if they are perceived as having ignored matters of serious concern to existing or potential customers. Even the district court recognized the networks' ability to resist coercion: "No one doubts that the networks could have resisted if they had chosen to do so. They are not quivering or powerless institutions. Instead, they freely chose to abdicate the burdens of independent decisionmaking." 423 F.Supp. at 1158.

[32] *See* 15 U.S.C. § 2056(b), 16 C.F.R. § 1032 *et seq.* (Consumer Product Safety Commission). *See also* 49 C.F.R. § 554 (National Highway Traffic Safety Administration).

[33] *See* Tr. 3571, 3733.

[34] 5 U.S.C. § 553.

362. The ability of government officials to advocate their views to the regulated industry through informal efforts, including jawboning, is an important part of the regulatory process.[35] For a Commissioner to be effective he must be free to discuss the policy matters before him. As the District of Columbia Circuit has recognized, "informal contacts between agencies and the public are the 'bread and butter' of the process of administration." *Association of National Advertisers v. FTC*, 627 F.2d 1151, 1169 (1979), *cert. denied*, 447 U.S. 921 (1980). And as the Court has held in a context closely related to this proceeding,

> If we were to accept the proposition . . . that the FCC may never resort to discussions with members of the industry in a general effort to have its regulatees conform to their public service obligations—the Commission would have little choice but to abandon any reasonable expectation of salutary self-regulation and to affirmatively regulate throughout the areas of children's programming and advertising. The problem, of course, is necessarily a matter of degree, and an agency may well be found to have abused its authority were it to employ overbearing "jawboning" or "arm-twisting" tactics.

Action for Children's Television v. FCC, 564 F.2d 458, 473 n. 27 (1977).

One advantage of a Commissioner being able to engage in the sort of dialogue in which Chairman Wiley involved himself here is that it avoids inflexible and rigid government rules.[36] We need not have a system that requires a new law or regulation for every problem, and we should be loathe to construe traditional exhortations by Commission members as impermissible.

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[35] We do not disagree with Judge Bazelon's observation that more care should be taken in "regulation by informal means where first amendment values are at stake rather than purely economic interests." *Consolidated Edison Co. of New York v. FPC*, 512 F.2d 1332, 1341 n. 54 (1975). However, it should be kept in mind that the use of informal techniques such as jawboning and any self regulation which results therefrom is one method by which the difficult balance among the various First Amendment interests involved in the broadcast media has been made. *See CBS v. DNC, supra*, 412 U.S. at 102, 117, 120. Moreover, it is noteworthy that the complaining parties here were not the networks who were supposedly coerced and intimidated by Chairman Wiley's jawboning. Rather the complaining parties were individuals and companies who desired to sell programs to the networks. These parties felt cramped by the networks' "freely chose[n]" decision to restrict the type of material that they broadcast during certain hours. The networks argued vigorously during this litigation, and we are persuaded, that their decision was "an *editorial* one, not different in kind from those commonly made in the course of day-to-day editorial decisionmaking. . . . [C]onducting a searching judicial inquiry into the motivation for such an editorial decision, and invalidating it based upon a finding of improper motivation, directly infringes on the constitutional right of editorial freedom." Brief for American Broadcasting Companies, Inc., et al. in *Writers Guild of America v. American Broadcasting Companies, Inc.*, Nos. 77-1058, et al. (9th Cir.) at 29.

[36] Even the district court recognized that Chairman Wiley's jawboning in this case was an attempt to ensure that more formal statutory or administrative action would not be taken, which Chairman Wiley sincerely believed would be far less desirable from a constitutional and regulatory standpoint than self-regulation. 423 F.Supp. at 1096.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Candor
Comparative Hearing
Diversification of Control of the Mass Media
Review by Review Board

I.D. affirmed. One of three applicants disqualified for deliberate lack of candor at hearing. Substantial integration preference outweighed slight-to-moderate diversification preference. Rejected allegations of regional concentration of control; trafficking; poor past broadcast record. Good cause shown for amending main studio location to comply with Section 73.1125 promptly after summary decision denied.

–Old Time Religion Hour, Inc.
BC Docket No. 80–445

FCC 83R-77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

THE O.T.R.H., INC., THE OLD TIME RELIGION HOUR, INC. Galveston, Texas	BC Docket No. 80–445 File No. BPCT-5173
ALDEN COMMUNICATIONS OF TEXAS, INC. Galveston, Texas	BC Docket No. 80–446 File No. BPCT-780907KE
BLUEBONNET BROADCASTING COMPANY Galveston, Texas	BC Docket No. 80–447 File No. BPCT-780907KF
For a Construction Permit for a New Commercial Television Station	

Appearances

Lee J. Peltzman, *Robert L. Olender*, and *Aaron Shainis*, on behalf of The O.T.R.H., Inc., The Old Time Religion Hour, Inc.; *Jerome S. Boros* and *Zave M. Unger*, on behalf of Alden Communications of Texas, Inc.; and *Robert A. Beizer*, *R. Clark Wadlow*, and *Jane D. Woodfin*, on behalf of Bluebonnet Broadcasting Company.

DECISION

(Adopted: September 27, 1983; Released: October 7, 1983)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of The O.T.R.H., Inc., The Old Time Religion Hour, Inc. (Old Time); Alden Communications of Texas, Inc. (Alden); and Bluebonnet Broadcasting Company (Bluebonnet) for authority to construct a new commercial television station to operate on Channel 48 at Galveston, Texas. By Hearing Designation Order, 45 Fed. Reg. 58683, published September 4, 1980, the applications were designated for consolidated hearing on a main studio location issue against Old Time and the standard comparative issue. In addition, by Memorandum Opinion and Order, FCC 81M-614, released March 3, 1981, presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) added an issue against Old Time to determine whether its principal, Reverend George J. Lupo, or his associates broadcast false, misleading, or deceptive information regarding how long the proposed station would be on the air, or its proposed location, during the course of "The Old Time Religion Hour" radio program on Station KXYZ(AM), Houston, Texas.

2. The Initial Decision (I.D.), FCC 83D-11, released February 18, 1983, granted Bluebonnet's application. In reaching this result, the ALJ found Old Time to be disqualified under both the main studio location and misrepresentation issues, but contingently considered its application on a comparative basis. He found that Bluebonnet was entitled to a substantial integration preference which, he concluded, outweighed smaller preferences for diversification of ownership of the mass media that were awarded to Old Time and Alden. The proceeding is now before the Review Board on exceptions filed by the losing applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held July 7, 1983, and our examination of the record. We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's disqualification of Old Time under the misrepresentation issue and his ultimate conclusion that grant of Bluebonnet's application will best serve the public interest, convenience, and necessity. Before reaching the comparative issue, we shall first address the issues involving Old Time's basic qualifications, because only basically qualified applicants are entitled to comparative consideration.

3. *Main Studio Location Issue.* Section 73.1125 (formerly 73.613) of the Rules, 47 CFR 73.1125, specifies that the main studio of a TV broadcast station must be located within the station's principal community of license except when good cause exists for locating it outside that community and such operation would be consistent with the public interest. The ALJ found that Old Time proposed to locate its main studio at Friendswood, Texas, approximately 27.2 miles

from the city limits of Galveston (the proposed community of license in this proceeding) and about 8 miles from the Houston city limits. *I.D.*, para. 39. The Friendswood site location was formerly the studio and transmitter site for Station KVVV-TV, Galveston, Texas, which had operated from that location pursuant to a waiver of the main studio location rule. After examining the means of access to the Friendswood site that the Galveston citizenry would have (*I.D.*, paras. 40–41), the ALJ concluded that the proposed studio location would be considerably inconvenient to them and would specifically interfere with Old Time's ability to serve the public. *I.D.*, paras. 44–45. He also found that Old Time's reliance on a waiver given in the past by the Commission to Station KVVV-TV was insufficient to demonstrate good cause for a waiver at present. *I.D.*, para. 43. He therefore concluded that Old Time was technically disqualified. *I.D.*, para. 45.

4. In its exceptions, Old Time argues that it should not have been found technically disqualified on the basis of its Friendswood studio proposal because it subsequently attempted to specify a Galveston location. Specifically, it alleges that the ALJ erred, first, in rejecting its January 22, 1981 amendment proposing to locate its main studio in Galveston, and, second, in denying its motion for summary decision predicated upon that amendment. Old Time Br. at 5–7. It also claims, in the alternative, that it had demonstrated good cause for proposing the Friendswood site. Old Time Br. at 7–13. Alden and Bluebonnet respond that Old Time's amendment to specify a Galveston location and its waiver request to locate in Friendswood were both properly rejected for lack of good cause. Alden Reply Br. at 3–7; Bluebonnet Reply Br. at 7–11.

5. We reverse the ALJ's technical disqualification of Old Time because we find that Old Time had good cause for filing its January 22, 1981 amendment, that the amendment should therefore have been accepted, and that, based on the amendment, Old Time should have been awarded summary decision on the main studio location issue. "The traditional test of good cause for postdesignation amendments is outlined in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970): (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage." *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 29, 52 RR 2d 63, 65 (Rev. Bd. 1982). Here, as in *Bison City*, it is undisputed that points (3) and (6) are inapplicable, as is point (5), because it is well-established that no party has a vested interest in the disqualification of a competing applicant. *Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971). Although Old Time's amendment was

voluntary (point 2), the Commission has not required a showing that an amendment is occasioned by an involuntary act in cases such as this one where the amendment removes a disqualifying defect and confers no comparative advantage. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488–489, 49 RR 2d 1589, 1594 (1981). Thus, our analysis of whether Old Time's amendment was accompanied by good cause must focus on points (1) and (4), the elements of due diligence and disruptiveness.

6. In response to the publication on September 4, 1980 of the hearing order which designated a main studio location issue against it, Old Time amended its application twenty-two days later, on September 26, to request a rule waiver to permit it to use its originally-proposed Friendswood site,[1] and filed a motion for summary decision based on that amendment on October 3. A supplemental amendment was filed on October 27. The ALJ denied the motion for summary decision at a prehearing conference on October 29 (Tr. 15–16, 18–19), and Old Time filed a petition for reconsideration of that ruling on November 4, 1980. By Orders released January 7, 1981 (FCC 81M-28 and FCC 81M-25), the ALJ formally denied Old Time's motion for summary decision and its petition for reconsideration which the ALJ treated as a request for permission to file an appeal. Fifteen days later, on January 22, Old Time filed both a petition for leave to amend to specify a Galveston main studio location and a petition for leave to file a motion for summary decision based on the amended studio site. The ALJ denied the petition for leave to amend on March 2, 1981 (Order, FCC 81M-579) for lack of good cause. The ALJ pointed to Old Time's previous election to seek a waiver of the main studio location rule, rather than amend to specify a conforming site, stressed that several months had elapsed between release of the designation order and filing of the new studio location amendment, and ruled that Old Time would be bound by its election. The first hearing session was held July 7, 1981.

7. Based on the foregoing chronology, we find that Old Time was duly diligent in seeking to amend to meet the main studio location issue designated against it. After the ALJ's ruling denying summary decision on its waiver request was released (January 7, 1981), Old Time promptly (fifteen days later) filed a petition for leave to amend to specify a new site. Acceptance of the amendment would have led to a removal of the issue and a finding that Old Time was technically qualified. Moreover, no disruption to the hearing process would have ensued. The first hearing session was not held until over five months after the amendment was filed. Furthermore, the fact that several months had elapsed since publication of the designation order is of

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[1] A waiver was not actually required because, as noted previously, Section 73.1125, by its terms, allows for location of a main studio outside the principal community upon a showing of good cause.

no consequence because Old Time had also sought diligently during that time to justify its originally proposed Friendswood location. Thus, the train of events clearly indicates that Old Time first sought to prevail on its Friendswood location and, when that failed, almost immediately attempted to specify a Galveston studio – all without apparent disruption of the hearing schedule. These facts distinguish this case from *Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978), *recon. granted in part*, 88 FCC 2d 922 (1981), relied on by Bluebonnet, where an applicant displayed an extreme lack of due diligence in filing a transmitter site amendment even though it knew the proposed site was probably unavailable, and where the changes it proposed would have precluded the hearing from going forward as scheduled, and thus disrupted the proceeding. Also inapposite is *Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980), cited by Bluebonnet, where the applicant waited seven months before amending although it had express notice that its proposed site was unavailable.

8. We also reject Alden's contention that Old Time's amendment "suggests artifice" because although it knew in November 1980 that it could find a suitable studio location within Galveston, it continued to prosecute its waiver request. Alden Reply Br. at 4; see also Bluebonnet Reply Br. at 8. In the "Waiver Request" attached to its September 26, 1980 amendment, at 3, Old Time requested a Friendswood main studio location predicated, in part, on its representation that:

> Galveston is an island and, as such, building space is at a premium. Considering the shortage of available building sites within Galveston, and the natural economics to be achieved by joint [transmitter and studio] operation, approval for the use of [the Friendswood] site is again warranted.

Later, when Old Time filed its January 22, 1981 petition for leave to amend proposing a Galveston main studio location, it attached a November 3, 1980 affidavit of Abe Kellner, a licensed real estate broker in Galveston, who asserted that "property suitable for a television studio is at a premium in the City of Galveston at the present time. Nevertheless, I am confident . . . that at the time [Old Time's] application would be granted, suitable space could be found." We find no inconsistency in these pleadings because both the Kellner affidavit and the earlier waiver request point out that potential studio sites in Galveston are "at a premium," and Old Time never asserted that such a site was unobtainable, but only that it made greater economic sense for it to use the Friendswood site rather than procure a Galveston site. Moreover, Old Time did not act improperly in continuing to prosecute its Friendswood request in spite of its knowledge that a Galveston site could be obtained. It needed only to show good cause for its Friendswood location, not the impossibility of finding a site within the principal community. Once the ALJ formally denied summary decision based on the Friendswood location, it promptly amended to propose a new studio location in the proposed community of license. Thus, we disagree with the ALJ's conclusion that Old Time was bound by its waiver request and could not amend to specify a Galveston studio, even with an appropriate good cause showing.[2] That showing having been made, Old Time is found qualified under this issue.

9. *Misrepresentation Issue*. This issue, added pursuant to an October 6, 1980 petition to enlarge issues filed by Bluebonnet, sought to determine whether Old Time's president and proposed general manager, Reverend George J. Lupo, or his associates misrepresented the hours or location of the proposed station during his radio program over KXYZ(AM), Houston, Texas, on various dates in May, August, and September 1980. Evidence under the issue showed that numerous on-the-air references were made to Old Time's efforts to create a "24-hour a day" "Christian television station" "in Houston." *I.D.*, paras. 49–56. However, Old Time actually proposes to broadcast 81 hours a week or 11 to 12 hours per day, and Galveston is the proposed community of license. *I.D.*, para. 48. The ALJ found no misrepresentation in the broadcasts because the evidence failed to indicate an intent or motive by Reverend Lupo or others to mislead the public, or that anyone was actually misled by the on-the-air statements. *I.D.*, para. 57. He found that the "24-hour" references were made "as an expression of a hope or expectation" and that the references to Houston were more likely to be understood by listeners as meaning that the proposed station would be received in Houston rather than licensed to that city. *I.D.*, paras. 58–59.

10. The ALJ made additional findings and conclusions, however, pertaining to Old Time's submission of rebuttal evidence at hearing, which consisted of tapes of certain broadcasts and related testimony of Reverend Lupo and Iretta Woolley, Old Time's treasurer and proposed station employee. Specifically, Old Time submitted partial transcripts of six programs to show that Rev. Lupo advised his listeners that the proposed station would be licensed to Galveston and not Houston and that, initially, the station would operate between 11 and 12 hours a day. *I.D.*, para. 60. Four of the transcripts were labelled with dates of programs aired prior to the filing of Bluebonnet's petition to enlarge issues—September 19, October 1, 2, and 4, 1980—and the remaining two were labelled with dates of October 9 and 18, 1980, after the petition was filed. Both Mrs. Woolley, who taped the programs, and Rev. Lupo, who sponsored the tapes exhibit, averred to the accuracy of the dates and the dating procedures. *I.D.*, paras. 61, 63. After this testimony, however, when Bluebonnet announced that it would introduce transcripts to prove

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[2] The ALJ's conclusion in FCC 81M-579, *supra*, that Old Time would "be bound" by its earlier waiver request was apparently based on a view that Old Time's later amendment alternative lacked due diligence. Having concluded otherwise, we are unaware of any case precedent that precludes a duly diligent applicant from using alternative showings to meet a basic qualifying issue.

the tapes were falsely dated (Tr. 248–50), both Lupo and Woolley changed their account and admitted that the dates were incorrect. *I.D.*, paras. 61–64.

11. Upon review of their testimony, the ALJ "found the demeanors of both Rev. Lupo and Mrs. Woolley to be unconvincing." *I.D.*, para. 65. Because Mrs. Woolley gave "many versions as to when the tapes were dated," after initially testifying unequivocally that they were dated when removed from the recorder, he concluded that she lacked candor in her testimony at hearing. *I.D.*, para. 65. He similarly concluded that Rev. Lupo lacked candor because of his "wavering testimony as to whether or not the pertinent tapes were dated when given to him by Mrs. Woolley; his inability to recall whether he contributed to the dating of the tapes; and his failure initially to have any doubts as to the accuracy of the dates given to the tapes, when he knew that some of the tapes were dated many months after they were recorded." *Id.* The ALJ further found that because Rev. Lupo and Mrs. Woolley had been acutely aware of the accusations contained in Bluebonnet's October 6, 1980 petition to enlarge issues, they had a clear motive to mislead the Commission regarding the dates of the tapes in question. *I.D.*, paras. 66–67. He ultimately concluded that because of his deceit by its principals, Old Time lacked the necessary character qualifications to be a Commission licensee. *I.D.*, para. 68.

12. In its exceptions, Old Time levels a two-pronged assault on the ALJ's conclusion that it should be disqualified on character grounds. First, it alleges that because no candor issue concerning the dating of the tapes was specified in the proceeding, it lacked notice and an opportunity to be heard regarding the charges of falsification of evidence and deliberate false testimony. Old Time Br. at 14–20.

13. It is now clear that an applicant may be disqualified on the basis of its principals' candorless testimony when the lack of candor occurs "before the judge's own eyes," *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 234 (D.C. Cir. 1981) (*citing Taylor* v. *Hayes*, 418 U.S. 488, 499 (1974)). Moreover, the Commission has long held that false statements in the course of the hearing process are, in and of themselves, of substantial significance, *Nick J. Chaconas*, 28 FCC 2d 231, 233, 21 RR 2d 576, 579 (1971), that specific notice to an applicant that he must testify truthfully is superfluous, and that such false testimony may lead to disqualification. *Grenco, Inc.*, 39 FCC 2d 732, 736, 26 RR 2d 1046, 1051 (1973). Recently, the Commission reiterated that lack of candor need not be specially designated as a hearing issue because "truth and candor are always in issue." *William M. Rogers*, 92 FCC 2d 187, 199–201, 52 RR 2d 831, 842–3 (1982); *see also Peoples Broadcasting Corp.*, 52 RR 2d 1617, 1625, *recon. denied*, 53 RR 2d 1210 (Rev. Bd. 1983). Indeed, Old Time concedes (Br. at 16–17), as it must, that adverse candor findings can be the basis for disqualifying an applicant, even in the absence of a specified candor

issue, provided: (1) the misconduct occurred directly before the agency and was of sufficiently blatant and unacceptable dimension that its existence could not be gainsaid; (2) it was evident that the party had actual notice of the conduct at issue and was not prejudiced by surprise; and (3) the party had an opportunity to speak in its own behalf, citing *RKO General, Inc.* v. *FCC, supra*, 670 F.2d at 235–36. These conditions, consistent with *Grenco* and *Rogers*, have been met in this case.

14. The misdated tape transcripts (see paragraph 10, *supra*) were submitted by Old Time into evidence at hearing in an effort to meet the misrepresentation issue designated against it (Old Time Exh. 8 at 2–3, 11–20), and the testimony of Reverend Lupo and Mrs. Woolley, which is the entire factual basis for the ALJ's candor findings and conclusions, was taken on the record before that ALJ (Tr. 159–173, 177–253, 262–72, 278–323, 323–45). Near the end of the initial cross-examination of Rev. Lupo, it became clear beyond peradventure that the accuracy of the dates of the tapes and, by necessary implication, the candor of Lupo and Woolley would be at issue. *See* Tr. 247–53. At this point, counsel for Bluebonnet indicated that it would later submit into evidence tapes it made of some of the Old Time broadcasts in question, and that a comparison of the Bluebonnet and Old Time tapes would show that the Old Time broadcasts were not made on the alleged dates. Tr. 248–50. The next morning Reverend Lupo recanted and admitted that "the dates are wrong." Tr. 266. Lupo and Woolley were then extensively examined by Old Time's counsel, as well as opposing counsel, to determine whether they had intentionally attempted to deceive the Commission. *See, e.g.*, Tr. 277 (Bureau counsel seeks to ascertain whether mistake was inadvertent); Tr. 291 (Alden counsel states there are "questions of credibility"; ALJ agrees); Tr. 300 (ALJ states that "the questions all seem directed to the witness's credibility"); Tr. 316 (Old Time counsel tries to establish "that [Woolley] had no motive to misdate" the tapes). Thus, the inaccuracy of the dates on the tapes and the candor of Lupo and Woolley in testifying concerning the dates were squarely in issue at the hearing, Old Time knew that questions were being pointedly directed to the inconsistencies in its witnesses' previous statements, and Old Time presented oral testimony in its own behalf. We therefore find that Old Time had adequate notice and an opportunity to address the candor question. *See RKO General, Inc.* v. *FCC, supra*; *William M. Rogers, supra*, 92 FCC 2d at 201, 52 RR 2d at 843.

15. On the substantive issue of whether the testimony itself lacked candor, Old Time claims that the record evidence "demonstrates conclusively" that Lupo and Woolley "did not engage in any purposeful deception or intentional misrepresentations at hearing." Old Time Br. at 21. It attributes Woolley's initial erroneous testimony concerning her dating of the tapes to her "nervousness

and fear of being twisted around on cross-examination by counsel" (*id.* at 27) and further attributes Lupo's initial mistaken testimony to his complete reliance on Woolley, his long-time secretary (*id.* at 22–23, 31). It further argues that "the Judge's conclusion that [Old Time] had a motive for attempting to deceive the Commission is inconsistent with his earlier finding that Reverend Lupo did not broadcast misleading information" because, consequently, "there was no reason for him information" because, consequently, "there was no reason for him to engage in any scheme to fabricate evidence." *Id.* at 27–28. Finally, Old Time maintains that the testimony of Lupo and Woolley was, in fact, consistent and that any apparent inconsistencies are due to confusing and "whipsawing" cross-examination (*Id.* at 28–31).

16. We reject Old Time's exceptions as an incredible interpretation of the testimony herein and in irreconcilable conflict with the weight of the evidence and reasonable inferences that can be drawn from that evidence. The record evidence overwhelmingly supports the ALJ's conclusion that Mrs. Woolley and Reverend Lupo lacked candor when testifying about the tapes. See paragraph 18, *infra.* Initially, Woolley testified unequivocally that she dated the tapes immediately upon removing them from the tape recorder, in accordance with her "invariable" practice. Tr. 164–65. Likewise, Reverend Lupo originally testified that he made clear in his broadcasts well before Bluebonnet's petition to enlarge issues was filed on October 6 that his proposed station would not be on the air 24 hours a day. And when confronted with tape transcripts which appeared to refer to allegations made in Bluebonnet's petition, he denied that the references were to that petition and denied that the purported October 1, 2 and 4 programs could have in fact been aired after the petition was filed. Tr. 227–47. Immediately following this testimony, Bluebonnet announced that it intended to present rebuttal tape transcripts (Bluebonnet Exhs. 6–8) which would cast doubt on the accuracy of the dates that Old Time ascribed to its tapes. Tr. 248–50. Thereafter, both of Old Time's witnesses significantly changed their testimony.

17. After a dramatic courtroom apology,[3] Rev. Lupo admitted that the tapes were misdated, and conceded that the October 1, 2, 4, and 9 tapes should have each been dated one week later – October 8, 9, 11 and 16, respectively. He placed total responsibility for the error on Mrs. Woolley, and denied that he had any role in dating the tapes or that he previously had any reason to doubt the accuracy of the dates on any tapes. Tr. 262–66. Mrs. Woolley was recalled for cross-examination and testified that, although her "general practice" was to date tapes immediately upon removing them from the tape

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[3] Reverend Lupo: ". . . I cannot live a lie . . . . I would want truth to abound . . . . I ask the forgiveness of this Court . . . ." Tr. 266.

recorder (Tr. 278), she did not – for reasons unexplained – date these particular tapes in her "invariable" manner; instead, she admitted that she dated them sometime after the recordings were actually made and reconstructed the dates based on their contents. Tr. 279. She conceded that the allegations in Bluebonnet's petition were discussed "around the office," Tr. 303, and that she reviewed the tapes in the Spring of 1981 at the time of depositions to see if Rev. Lupo "had ever . . . said it the right way." Tr. 303–04, 308–9. She further testified that Rev. Lupo knew that she was trying to reconstruct dates for some undated tapes and he helped her in that process. Tr. 307, 317–22. Mrs. Woolley stated that she "may have" dated in 1981 the particular tapes that Old Time submitted into evidence and that about one-third of the tapes she reviewed in 1981 were undated. Tr. 311–13. On recross-examination, Rev. Lupo, while alleging some difficulty remembering, admitted that Mrs. Woolley had given him some undated tapes, although he thought that the particular tapes relied on by Old Time in this proceeding were dated. Tr. 325, 328. As to his role in dating tapes, he now conceded that he listened to tapes in order to help Mrs. Woolley establish dates. Tr. 326, 328–9. He contended that he did not recall whether he helped date any of the particular tapes relied on by Old Time at hearing (Tr. 328), but stated that he "had no reason to question" the dates. Tr. 331.

18. Absent patent conflicts with the record evidence, the Commission accords special deference to an ALJ's credibility determinations, *Milton Broadcasting Company*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972); *Gilmore Broadcasting Corporation*, FCC 83R-72, released September 30, 1983, para. 10 (Rev. Bd.); *Country Broadcasting Co.*, 53 RR 2d 293, 297 (Rev. Bd. 1983), because the trier of fact has had a superior opportunity to evaluate the witnesses' demeanor and judge their credibility. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *see also FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965). Such deference is clearly warranted here. We have fully considered Old Time's protestations of innocence (*see* para. 15, *supra*), but find them unbelievable. The testimony of Mrs. Woolley and Rev. Lupo was riddled with inconsistencies, confusion, and convenient lack of recall of events that occurred within the 10 months preceding hearing (September 1980 to July 1981), and we find nothing in counsel's questioning that could have led to these testimonial difficulties. On the other hand, the motivation of these witnesses to dissemble is apparent. Despite Old Time's denials, the tape dating was critical to them because they were trying to establish that Rev. Lupo's broadcasts were accurate even before the filing of Bluebonnet's petition to enlarge issues, which raised the misleading broadcasts question in this proceeding. That they were aware of Bluebonnet's petition and had discussed it was admitted by

Mrs. Woolley. They both insisted initially that the tapes *could not possibly have been misdated* because they were dated immediately after the broadcasts. Their later testimony, necessitated by Bluebonnet's revelation that it possessed rebuttal tapes in conflict with theirs, was totally contrary. Rev. Lupo compounded the pseudology when he sought to place all blame for misdating on Mrs. Woolley, only to admit following her further cross-examination that he had assisted her in establishing dates.

19. The ALJ's conclusion that Rev. Lupo did not broadcast misleading information does not mean that there was no motive to deceive, as Old Time argues, since Lupo and Woolley testified prior to issuance of the *I.D.* and could not know the ALJ's conclusion. Their obvious dishonesty concerning the dating procedures also belies the innocence of the dating errors themselves; the consistent misdating of tapes by precisely one week not only supports the conclusion that Lupo and Woolley lacked candor regarding the dating procedure but also compels the logical inference that Mrs. Woolley and Rev. Lupo engaged in a deliberate pattern of falsely dating tapes. Nevertheless, we need not reach the question whether the misdating itself was intentional, because Old Time's deliberate cover-up of the faulty dating procedure is sufficient to disqualify it. The testimonial lack of candor of Old Time's principals herein is conduct that cannot be tolerated in Commission licensing proceedings and which reflects very gravely on an applicant's character qualifications. To protect the integrity of the Commission's adjudicatory process and to maintain a high standard of licensee character, outright disqualification of the responsible applicant is the appropriate sanction. *See, e.g., William M. Rogers, supra*, 92 FCC 2d at 200–01; *Nick J. Chaconas, supra*; *Country Broadcasting, supra*, 53 RR 2d at 298. We therefore affirm the ALJ's disqualification of Old Time and proceed to the comparative consideration of the applications of Bluebonnet and Alden.

20. *Diversification of Control of the Media of Mass Communications*. Alden is 100% controlled by its president, Michael R. Forman, who has 80% ownership interests in the permittees of television stations in Seattle, Washington, and Portland, Oregon, 100% ownership of a television permittee in Denver, Colorado, and a 10% ownership interest in the permittee of a television station in Las Vegas, Nevada. *I.D.*, paras. 11, 14; Bluebonnet Request for Official Notice filed August 5, 1983.[4] Forman is also the fifth or sixth largest motion picture operator in the country and through various companies owns or controls approximately 300 motion picture theatres. He also has operating control of the 19% owner of Oceanic Cablevision Corporation which, in conjunction with a wholly-owned subsidiary,

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[4] The Denver interest was reported in Bluebonnet's request for official notice, which we shall grant.

serves approximately 53,500 cable television subscribers in Oahu, Hawaii. *I.D.*, para. 14. Bluebonnet's 80% owner, Raymond G. Schindler, is president and 52% owner of the licensee of an AM-FM broadcast station combination in La Grange, Texas; president and 49% owner of the licensee of a television station in Fort Smith, Arkansas; president and 83% owner of the licensee of a television station in Nacogdoches, Texas; and 77% owner of the licensee of a television station in San Angelo, Texas. *I.D.*, paras. 17, 35. Its secretary-treasurer and 4% owner, Jo Edgell-Blaskowsky, is an officer in the La Grange radio licensee and owns 2% of the Fort Smith, Nacogdoches, and San Angelo television licensees. *I.D.*, paras. 17, 36. In addition, Frank W. Head, who is a 10% stockholder of Bluebonnet, has a 26.9% ownership interest in the permittee of a television station in Austin, Texas. *I.D.*, paras. 17, 37. The ALJ awarded Alden a diversification preference of unspecified weight over Bluebonnet, but because neither applicant owned any media interests in Galveston and because it seemed unlikely that a grant to Bluebonnet would "create too great a concentration of opinion within" the state, he decided that the substantial integration preference he awarded Bluebonnet far outweighed Alden's diversification preference. *I.D.*, paras. 81–83.

21. Alden argues that it should have been awarded a substantial diversification preference because Bluebonnet has attributable regional media ownership interests in three television and two radio stations compared to Alden's far more distant interests in three (now four) television permittees. Alden Br. at 23–27. We conclude that Alden has overstated its diversification advantage and that at most it is entitled to a slight-to-moderate preference over Bluebonnet under the diversification criterion. To begin with, neither applicant has attributable interests in the proposed community of license, a factor given the most weight by the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394–5, 5 RR 2d 1901, 1908–09 (1965), nor in the remainder of the service area, which is of next importance. *Id.* In fact, Bluebonnet's closest media interest is 132 miles from Galveston. On the other hand, Bluebonnet's interests are closer than Alden's because they are all in Texas or Arkansas. Indeed, Alden has alleged that if the Bluebonnet application is granted, Bluebonnet will control 3 television stations on a 420-mile north-south axis in those states. However, it has not specifically shown that Bluebonnet's interests are significant in terms of number and size, regional or national coverage, or with respect to other media in their localities—factors emphasized by the *Policy Statement*, 1 FCC 2d at 395—nor that ownership of these stations would amount to concentration of control on a regional scale. *See Multiplex Communications, Inc.*, FCC 83R-60, released August 30, 1983 (Rev. Bd.). We do, nevertheless, agree with Alden that its media interests are less significant than Bluebonnet's, because they are much more

distant, and that its ownership of movie theatres (none of which is closer than 1000 miles from Galveston) is a very minor matter, *see Peoples Broadcasting Corp.*, *supra*, 52 RR 2d at 1630. The award to Alden of a slight-to-moderate preference over Bluebonnet best expresses the relative significance of their current mass media ownership interests.

22. *Integration of Ownership and Management.* Alden does not propose to integrate Michael R. Forman, its sole owner, into management. *I.D.*, para. 13. Bluebonnet was awarded 84% full-time credit for proposing to integrate Raymond G. Schindler, its 80% owner, who will be president of the proposed station, and Jo Edgell Blaskowsky, a 4% stockholder, who will serve as full-time general manager and general sales manager of the proposed station. *I.D.*, paras. 17, 18, 21. The ALJ gave Bluebonnet a substantial integration preference over Alden, based predominantly on a comparison of their respective quantitative integration credits of 84% and 0%, and further found that the qualitative attributes of Bluebonnet's principals contributed to its advantage. *I.D.*, para. 79. Alden maintains (Alden Br. at 27–29) that Bluebonnet should not receive any integration credit because it has not specified its operational, staffing, and organizational plans and has not defined the duties of Schindler and Blaskowsky nor determined how they will split their decision-making responsibilities.[5] For the reasons that follow, we reject these exceptions and affirm the ALJ's ruling that Bluebonnet should be credited with 84% full-time integration and should receive a substantial preference therefor.

23. The record shows that Mr. Schindler, who maintains residences in Galveston and nearby Houston, intends to devote at least 40 hours a week to his station duties and will be responsible for making the ultimate decisions in all phases of day-to-day station operations, including the securing of programming. Bluebonnet Exhs. 1, 2(e); Tr. 753, 806. He anticipates actually working 50–70 hours a week at the station, and has in the past worked 60–80 hours a week as president and general manager of a television station. Tr. 743–45. Ms. Blaskowsky will devote at least 40 hours per week to her responsibilities as general manager and general sales manager of the

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[5] Also, Alden claims, in what amounts to a quasi-trafficking argument, that Bluebonnet's integration proposal is not creditable because Bluebonnet intends to sell the station if it is not profitable within three years. It cites for support Schindler's testimony as follows: "Three years, if somebody doesn't operate it right . . . somebody else will take it over" (Tr. 811). We agree with Bluebonnet that this statement most likely refers to a take-over by creditors, and not a sale. Schindler has not been shown to have engaged in trafficking in the past, as Alden alleged, *see* paragraph 24, *infra*, and Alden's argument that Schindler will do so in the future is purely speculative and unsupported by the record. We therefore reject Alden's exception. In any event, the Commission recently amended 47 CFR 73.3597 and repealed the three-year "trafficking" rule. *Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982).

station. She is a Houston resident and has past television broadcast experience as a sales manager. Bluebonnet Exhs. 1, 2(b). She will be in charge of the sales effort of the station and, as general manager, will be directly involved with programming, traffic, film, and production. Tr. 575–76. Schindler and Blaskowsky have discussed programming plans as well as station staffing. Tr. 577–579. Ms. Blaskowsky will discuss with Mr. Schindler all major decisions, such as whether to make a large programming expenditure, but will have full power to give salary increases to or fire employees. Tr. 616–17. Her primary responsibility will be in sales, but she will also scrutinize all departments, including programming, production, public affairs, news, etc. Tr. 617–18. In short, the ALJ's award of full-time quantitative integration credit for the participation of Schindler and Blaskowsky is fully supported by the record, which demonstrates that they will indeed be performing high-level managerial functions and that their respective duties are well-defined. We affirm the ALJ's conclusion that the 84% differential in quantitative integration between the Bluebonnet and Alden proposals manifestly entitles Bluebonnet to a substantial preference. *See Family Broadcasting Group*, __ FCC 2d __ , 53 RR 2d 662 (Rev. Bd. 1983); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 45 RR 2d 1709 (Rev. Bd. 1979).[6]

24. *Trafficking.* Alden excepts to the ALJ's ruling (Memorandum Opinion and Order, FCC 81M-330, released February 4, 1981) denying its October 6, 1980 petition to enlarge issues, which sought the addition of a trafficking and related misrepresentation issue against Bluebonnet. Alden does not, however, press the misrepresentation element of its petition in its exceptions, and that objection is therefore waived. Section 1.277(a) of the Rules, 47 CFR 1.277(a).[7] It does contend that Bluebonnet's principal stockholders engaged in trafficking when they sold their interests in Station KDOG-TV, Houston, Texas, which they had held from 1970–1978. However, as indicated at note 5, *supra*, the Commission recently repealed the "three-year rule" (Section 73.3597(a)-(d)) and its underlying anti-trafficking policy. *Transfer of Broadcast Facilities*, *supra*. While a limited anti-trafficking rule has been retained, which pertains to the

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[6] Although Old Time is not entitled to comparative consideration, we note that it excepted to its award of 33-1;3% rather than 100% full-time integration credit. We reject this exception out-of-hand. Because it is a non-profit organization legally governed by a three-member board of directors, and only one director would be integrated full time, it is entitled to 33-1;3% credit only. *See Loyola University*, 12 RR 1017, 1109 (1957), *aff'd sub nom. Noe* v. *FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959); *Joseph Bahr*, 92 FCC 2d 114, 121, 52 RR 2d 996, 1000–01 (Rev. Bd. 1982); *see also WHW Enterprises, Inc.*, 89 FCC 2d 799, 816–17, 51 RR 2d 409, 420–21 (Rev. Bd. 1982), *rev. denied*, FCC 83–368, released September 15, 1983.

[7] At oral argument, counsel for Alden vaguely referred to "truthfulness" in regard to its trafficking allegations (Tr. 1102–3), but we find nothing in its exceptions to indicate any lack of candor on the part of Bluebonnet's principals.

transfer of bare construction permits, as well as a one-year holding period when a grant has resulted from a comparative hearing, these situations do not appear applicable to the case at bar because it is undisputed that Bluebonnet's stockholders held their interests in the licensee for eight years prior to sale. In any event, even if the previous anti-trafficking policy were still applicable,[8] we agree with the ALJ that Alden did not demonstrate that Bluebonnet's principals acquired or operated Station KDOG-TV for the primary purpose of selling or otherwise disposing of it for profit rather than for the primary purpose of serving the public interest, or that those principals engaged in a pattern of buying and selling stations for profit. *See Thunderbird Broadcasting Co.*, 61 FCC 2d 1190, 39 RR 2d 622 (1976); *Harriman Broadcasting Co. (WXXL)*, 9 FCC 2d 731, 10 RR 2d 981 (1967), *aff'd*, 399 F.2d 569 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968). Alden's exception is therefore denied.

25. *Past Broadcast Record.* Alden excepts to the ALJ's ruling (Memorandum Opinion and Order, FCC 81M-3824, released December 3, 1981) that its July 28, 1981 threshold showing was inadequate to warrant inquiry into the allegedly poor past broadcast record of Bluebonnet's Raymond G. Schindler. Alden Br. at 5–17. Its allegations concern Schindler's performance at Crest Broadcasting Company's Station KDOG-TV, Houston, Texas, during his tenure there as president and 49% owner from 1971–78 and as general manager from 1971–75. First, Alden alleges that the programming performance of KDOG-TV, which went on the air in 1971, was substantially below the promises Crest made in 1965 concerning non-entertainment and local programming. Second, it alleges that Crest's actual performance as indicated by its composite week for the 1971–1974 license term and reported in its 1974 renewal application failed to fulfill its 1973 amended programming promises. We deny Alden's exception and affirm the ALJ's ruling.

26. Initially, we point out that Alden's comparison of Crest's actual performance with its 1965 promises to impeach Schindler's record is largely a *non sequitur*. In 1965, Schindler did not own any Crest stock and is not alleged to have been involved in any way with KDOG-TV management—as he was beginning in 1971—*a fortiori*, he had no role in the formulation of the 1965 promises. Second, as Bluebonnet points out in its opposition, Crest amended its programming promises in 1971, the year that Schindler became Crest's general manager. Significantly, Alden has *not* alleged that Crest's composite week showing for its performance during 1971–74 did not match its promises made in 1971. Third, Alden has not rebutted Bluebonnet's assertion that, except for the amount of local program-

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[8] Deleted subsection (d) of the rule authorized the Chief, Mass Media Bureau, to examine applications for assignment or transfer of broadcast interests held for longer than three years to determine whether any trafficking characteristics remained.

ming, the composite week for the three-year license period shows actual performance that falls between the more modest proposals of 1971 and the more ambitious ones of 1973, which is to be logically expected. Bluebonnet Opposition to Threshold Showing, filed August 12, 1981, at 12–13. As for local programming, Crest broadcast 3 hours 45 minutes in the composite week compared to 4 hours promised in 1971 and 4 hours 25 minutes promised in 1973. *Id.* at 13. This disparity does not appear on its face to be so significant as to in and of itself point to an unusually poor past broadcast record during Schindler's association with Station KDOG-TV. Nor, as the ALJ noted, did Alden make any showing that Crest's overall programming was not designed for and responsive to the needs of its community of license. Indeed, Crest's renewal application was routinely granted on July 31, 1974. Therefore, Alden's exception is denied because Alden wholly failed to present an adequate threshold showing that Schindler's past broadcast record was unusually poor. *See Gilbert Group, Inc.*, __ FCC 2d __, 49 RR 2d 1081 (1981).

27. One further matter warrants comment. At oral argument, the Board requested Alden to file a supplemental statement identifying the sources and documentation for its promise versus performance allegations concerning Schindler's record with Crest (Tr. 1133, 1152–59). On July 18, 1983, Alden filed a statement explaining that the 1973 Crest programming promises were set out in Bluebonnet's Opposition to Threshold Showing, *supra*, and that what Alden labeled the "1974 performance" was extracted from Crest's renewal application filed April 1, 1974, Section IV, and represented composite week figures from the preceding 1971–74 license term. Our analysis of Alden's exception comports with this explanation. Alden's statement goes on, however, to raise new matters concerning Crest's alleged 1974 promises and 1975–77 performance. Alden's July 18, 1983 Statement, at paras. 3–7 and Attachments B-H. This material will be stricken from the record as being beyond the scope of the Board's request for supplemental information as well as outside the information before the ALJ which we are reviewing. *See Bay Television, Inc.*, FCC 83R-70, released September 16, 1983, at para. 12 (Rev. Bd.).

28. *Summary*. All exceptions having decisional significance have been considered. We affirm the ALJ's disqualification of Old Time because of its lack of candor and therefore do not give its application comparative consideration. Under the standard comparative issue, Alden has been awarded a slight-to-moderate diversification preference over Bluebonnet, and Bluebonnet has been awarded a substantial integration preference over Alden. While a diversification preference normally outweighs a like integration preference, a slight diversification advantage may be outweighed by a substantial integration advantage. *Gilbert Broadcasting Corporation*, 91 FCC 2d 450, 469–70, 52 RR 2d 429, 444–45 (1982), *recon. denied*, FCC 83–30,

released January 25, 1983; *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied*, FCC 83–235, released May 18, 1983; *Lorenzo W. Milam and Jeremy D. Lansman*, 6 FCC 2d 198, 9 RR 2d 204 (Rev. Bd. 1966). We therefore agree with the ALJ that Bluebonnet's substantial integration preference—which is based not only on an overwhelming 84% quantitative differential but also on its principals' local residence, broadcast experience, and other qualitative virtues—far outweighs Alden's significantly smaller preference for diversification. A grant of the Bluebonnet application will best serve the public interest, convenience, and necessity.

29. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Alden Communications of Texas, Inc. on May 2, August 10, August 29 and September 6, 1983 ARE GRANTED, and the amendments ARE ACCEPTED; and

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed April 14 and September 20, 1983 by Bluebonnet Broadcasting Company ARE GRANTED, and the amendments ARE ACCEPTED; and

31. IT IS FURTHER ORDERED, That the request for official notice filed August 5, 1983 by Bluebonnet Broadcasting Company IS GRANTED; and

32. IT IS FURTHER ORDERED, That the motion to strike filed February 22, 1983 by Alden Communications of Texas, Inc. IS DENIED; and

33. IT IS FURTHER ORDERED, That the application of Bluebonnet Broadcasting Company (File No. BPCT-780907KF) for authority to construct a new commercial television station at Galveston, Texas IS GRANTED, and the applications of The O.T.R.H., Inc., The Old Time Religion Hour, Inc. (File No. BPCT-5173) and Alden Communications of Texas, Inc. (File No. BPCT-780907KE) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

THE O.T.R.H., INC., THE OLD TIME RELIGION HOUR, INC. Galveston, Texas	BC Docket No. 80–445 File No. BPCT-5173
ALDEN COMMUNICATIONS OF TEXAS, INC. Galveston, Texas	BC Docket No. 80–446 File No. BPCT-780907KE
BLUEBONNET BROADCASTING COMPANY Galveston, Texas	BC Docket No. 80–447 File No. BPCT-780907KF

For a Construction Permit

Appearances

Robert L. Olender on behalf of The O.T.R.H., Inc., The Old Time Religion Hour, Inc.; *Jerome S. Boros* and *Zave Unger* on behalf of Alden Communications of Texas, Inc.; *Robert A. Beizer* and *Meredith Senter* on behalf of Bluebonnet Broadcasting Company; and *Ydalia Paulette Freeman* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.[1]

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: February 10, 1983; Released: February 18, 1983)

Preliminary Statement

1. This proceeding involves the mutually exclusive construction permit applications of The O.T.R.H., Inc., The Old Time Religion Hour, Inc. (OTRH), Alden Communications of Texas, Inc. (Alden), and Bluebonnet Broadcasting Company (Bluebonnet) for a new television station to operate on Channel 48 in Galveston, Texas.

2. By Hearing Designation Order released August 12, 1980 (BC-34765), the Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, designated these applications for hearing in a consolidated proceeding on the following issues:

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[1] Formerly the Broadcast Bureau.

(1) To determine whether OTRH's application is in compliance with Section 73.613 of the Commission's Rules with respect to the proposed location of the main studio and, if not, whether good cause exists for the proposed location.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

3. By Memorandum Opinion and Order released March 3, 1981 (FCC 81M-614), the Presiding Judge designated the following issue against OTRH:[2]

> To determine whether George J. Lupo or his guests broadcast false, misleading, or deceptive information, either with respect to the amount of time the proposed station would be on the air, or the location of the proposed station, during the course of "The Old Time Religion Hour" radio program over KXYZ (AM), Houston, Texas on the following dates: May 22, 1980; August 23, 1980; and September 6, 22, 25, 28 and 30, 1980.

4. Prehearing conferences were held October 29, 1980 and March 12, 1981. Hearing sessions were held on July 7, 8, 9, 10, 14 and 16, 1981. The record was closed by Order released February 2, 1982 (FCC 82M-0338), and was reopened by Order released October 8, 1982 (FCC 82M-3116) for the limited purpose of identifying a document entitled "Joint Exhibit Concerning Media Interests of Bluebonnet Broadcasting Company and Alden Communications of Texas, Inc. Acquired Since July 16, 1981." The record was then closed. Proposed Findings of Fact and Conclusions of Law and replies thereto have been filed by all parties.

Findings of Fact

The O.T.R.H., Inc., The Old Time Religion Hour

5. The Old Time Religion Hour (OTRH) is a non-profit, non-stock corporation, incorporated in Texas in 1975 (Bluebonnet Exhibits 13 and 15). Reverend George J. Lupo is President, Director, and Chairman of the Executive Committee; Joyce Lupo is Senior Vice President; V. M. McDougle is Vice President and Director; James A. Capers is Secretary and Director; and Iretta Wooley is Treasurer (OTRH Exhibit 5).

6. In accordance with Texas law, OTRH is composed of three directors, George J. Lupo, V. M. McDougle and James A. Capers (Bluebonnet Exhibits 14 and 15). In the event that OTRH is the successful applicant, Rev. Lupo will serve as the full-time general manager of the station (OTRH Exhibit 4). Messrs. McDougle and Capers, both of whom are directors of OTRH, do not propose to be integrated into the operation of the station.

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[2] The Presiding Judge ruled at a prehearing conference held on March 12, 1981 that the issue would be considered for basic and/or comparative purposes (Tr. 44).

7. Rev. Lupo was born in Stateline, Mississippi, and has lived in the Golden Coast Area, that area between Houston and Galveston, Texas for the past 20 years. Rev. Lupo currently lives in Alvin, Texas, which is a suburb of Houston (OTRH Exhibit 1).

8. In June 1967, Rev. Lupo became Pastor of the Gospel Lighthouse Tabernacle Church, and began broadcasting daily on station KFMK-FM Houston, Texas (Tr. 399). He subsequently founded the Old Time Religion Hour in 1975. In September of that year, Rev. Lupo began broadcasting on television station KDOG, Channel 26, Houston, Texas (Tr. 394–395), and for a period of 14 months telecast a daily program from 8:30 to 9:30 A.M. (Tr. 398). In 1978, Rev. Lupo resigned his pastorate of the Gospel Lighthouse Tabernacle Church, and became pastor of the Revival Center Church in Friendswood, Texas. Rev. Lupo, in 1979, began broadcasting a radio program entitled "The Old Time Religion Hour" on station KXYZ which is aired live from 10:00 P.M. to 11:00 P.M. on weekday evenings and from 10:00 P.M. until 2:00 A.M. on Saturday nights and Sunday mornings (Tr. 178–179).

9. Rev. Lupo has been active in the following community groups: the Blind Conference; the Full Gospel Businessmen; the Christian Businessmen Committee; the Catholic Morality Group; Sanctuary Prison Ministry; People's Action; Tane; and Teen Challenge. In addition, Rev. Lupo has assisted the Texas Department of Community Affairs in its drug prevention program (OTRH Exhibit 1). Rev. Lupo, as part of his duties as a minister, counsels and ministers to the sick, elderly and needy (Tr. 368, 372), and organizes and participates in the collection of food, clothing, household goods, and medical supplies for them (Tr. 368, 374). Rev. Lupo has been nominated for the Jefferson Award in Houston, which is presented to the individual in the community who has given the most of himself for the community (OTRH Exhibit 1).

10. OTRH, its officers and directors have no ownership interest in, or control of any medium of mass communications (OTRH Exhibit 6).

Alden Communications of Texas, Inc.

11. Alden Communications of Texas, Inc. (Alden) is a Texas Corporation owned solely by Alden Communications Corporation (ACC) which in turn is wholly by Robertson Properties, Inc. (RPI). Micheal R. Forman is the sole owner of RPI (Alden Exhibit 1; Tr. 852–853).

12. Alden's officers and directors are: Michael R. Forman, President and Director; Jerome A. Forman, Vice President and Director; James J. Cotter, Vice President and Director; Ted Minsky, Vice President; John E. Bogardus, Secretary; and Constantine Hambas, Treasurer (Alden Exhibit 1).

13. Alden does not propose to integrate its principal and sole owner into the operation of the station.

14. Michael Forman has extensive media holdings. In addition to his 100 percent ownership interest in RPI and ACC, Mr. Forman is involved in cable television operations and, by his own testimony, is the fifth or sixth largest motion picture operator in the country (Tr. 912). He also has an 80 percent beneficial interest in the permittees of UHF television stations in Seattle, Washington and Portland, Oregon, and a 10 percent beneficial interest in the permittee of a UHF television station in Las Vegas, Nevada (Joint Exhibit 1). In addition, he has operating control of Consolidated Amusement Company which owns 19 percent of Oceanic Cablevision Corporation (Oceanic) (Tr. 869). Oceanic operates a cable system in Oahu, Hawaii, which serves approximately 50,000 subscribers, and it owns 100 percent of Pacific Cablevision Corporation with approximately 3,500 cable subscribers in Oahu, Hawaii (Tr. 871–873).

15. Mr. Forman is President and 8.67 percent owner of Pacific Theatres Corporation (Pacific Theatres) (Tr. 888). The remaining 91.33 percent is owned by a trust, of which Mr. Forman is the trustee (Tr. 889). Mr. Forman also owns, through another corporation, 8.67 percent of Cinema-5 Limited (Tr. 904), which operates or owns motion picture theatres, in addition to operating a television sales company and a non-theatrical company which provides programming to schools, hospitals and other institutions (Tr. 912). Cinema-5 Limited sells its products to motion picture theatres, and its television sales company sells its products to television syndicators (Tr. 912–913). Forman also owns a one-third interest in Pacific Taping Limited, which supplies television programming to broadcasters and cable companies in the Marshall Islands (Tr. 914).

16. Mr. Forman, through various companies, owns or controls approximately 300 motion picture theatres in the United States (Tr. 911), and, as noted above, is the fifth or sixth largest motion picture operator in the United States.

Bluebonnet Broadcasting Company

17. Bluebonnet is a Texas corporation. Its officers, directors and shareholders are: Raymond G. Schindler, President, Director and 80 percent stockholder; Frank W. Head, Vice President, Assistant Secretary, Director and 10 percent stockholder; Jo Edgell Blaskowsky, Secretary-Treasurer, Director and four percent stockholder; Paul Quintero, Director and two percent stockholder; Jewell Earles Banks, Director and two percent stockholder; Pedro Enriquez, Director and one percent stockholder; and Richard Marcentel, Director (Bluebonnet Exhibit 1).

Raymond G. Schindler

18. Mr. Schindler will be president of the proposed station and

proposes to work at least 40 hours a week at the station in the event that Bluebonnet is the licensee (Bluebonnet Exhibit 2(e); Tr. 804).

19. Mr. Schindler currently resides in Houston, Texas, but will move to Galveston if Bluebonnet is the successful applicant (Tr. 819). Mr. Schindler is a member of the Galveston Historical Foundation and the Galveston Chamber of Commerce. He is also a member of the River Oaks Breakfast Club, and the 100 Club of Houston, an organization which offers financial assistance to families of law officers killed in the line of duty. In 1964, he served as Chairman of the Houston-Harris County TB Association. He has also served on the Board of Directors of Southern Methodist University, Dallas, Texas, and the Junior College Board of Texas. Mr. Schindler is a member of the First Methodist Church of Houston (Bluebonnet Exhibit 2(e)).

20. Mr. Schindler was the general manager of station KDOG-TV, Houston, Texas, from 1970 to 1978 (Bluebonnet Exhibit 2(e)).

Jo Edgell Blaskowsky

21. In the event that Bluebonnet receives the permit for the Galveston station, Ms. Blaskowsky will serve as full-time general manager, as well as general sales manager for the station (Tr. 576).

22. Ms. Blaskowsky resides in Houston, Texas (Tr. 575). She is a member of the Board of Directors of the Houston Chapter of American Women in Radio and Television, as well as a charter member of the Board of Directors of the Houston Association of the Broadcast Executives of Texas. Ms. Blaskowsky is a member of the West University Baptist Church of Houston.

23. Ms. Blaskowsky is currently employed as an independent advertising and broadcast consultant. She was previously employed as general sales manager for Metromedia, Inc., KRIV-TV, Houston, Texas, and from 1971–1978, served as sales manager for KDOG-TV, Houston, Texas. From 1968 to 1971, she was an administrative assistant for Gaylord Broadcasting Company, the licensee of KHTV, Houston, Texas. Prior to that, she was employed in sales at KGBT, Harlingen, Texas from 1953–1959, WCMI, Ashland, Kentucky from 1951–1953, and WSAZ, Huntington, West Virginia from 1949–1951 (Bluebonnet Exhibit 2(b)).

Pedro Enriquez

24. Mr. Enriquez proposes to devote at least 40 hours a week to his duties as producer, director and host of a daily 30 minute program addressing the current job market (Bluebonnet Exhibit 2(c); Tr. 650). Mr. Enriquez will not participate in the actual management of the station, but will be involved in producing, directing and hosting a Spanish/English program (Bluebonnet Exhibit 2(c)).

25. Mr. Enriquez is of Mexican extraction and has resided in Galveston since 1947. Mr. Enriquez is a co-founder and charter

member of the Galveston chapter of LULAC, a Hispanic organization. Since 1947, he has held the positions of president, vice president, secretary-treasurer and chaplain of LULAC. In 1966, he was named LULAC Man of the Year for the State of Texas, and in 1976, served as the LULAC National Convention chairman with the responsibility for that year of organizing the national convention held in Galveston. In addition, Mr. Enriquez is a charter member of the Galveston Commercintes Unidos, the Mexican-American Chamber of Commerce. In 1968, he received the Simbolo Award for the outstanding American of Mexican extraction for that year. Mr. Enriquez is a member of the Men's Club of the Sacred Heart Roman Catholic Church in Galveston (Bluebonnet Exhibit 2(c)).

26. From 1968 to 1971, Mr. Enriquez served as a member of the board of the Galveston Community Action Council, a county government agency which provides social services to the poor. From 1972 to 1974, he was a member of the board of the Galveston Parks and Recreation Commission, appointed by the mayor and city council, and until May 1, 1981, served as administrator for the on-the-job training program which included the Federal CETA program for Jobs for Progress, Inc., a government affiliated agency. Mr. Enriquez occasionally substitutes for Paul Quintero as the disc jockey for a nightly Spanish language program on KGBZ(AM), Galveston, and formerly co-hosted a Spanish language talent show with Paul Quintero that was produced for a local cable television system (Bluebonnet Exhibit 2(c)).

Jewell Earles Banks

27. Ms. Banks, a director and stockholder of Bluebonnet, does not propose to involve herself in the managerial aspects of the station, but intends to write, produce and direct a children's program aimed at pre-school and elementary grade students. The program initially will be broadcast once a week, and, ultimately, daily (Bluebonnet Exhibit 2(a)).

28. Ms. Banks is a black woman who was born in Galveston and has lived there her entire life. For the past three years, she has been the principal of L. A. Morgan Elementary School in Galveston, and from 1973 through 1978, she was the principal of Golied Elementary School in Galveston (Bluebonnet Exhibit 2(a)).

29. Ms. Banks is a life member of the Texas State Teachers Association, a member of the National Education Association, the Texas Elementary Principal and Supervisors Association, the Galveston Education Association, the Association for Childhood Education, the Academic Excellence Affairs Committee, and the American Childhood Association. Ms. Banks is also an active member of the NAACP, the National Association of Colored Women's Clubs, Inc., the Galveston County Cultural Arts, Inc., the Galveston Historical Foundation and the Disabled American Veterans Auxiliary. She also

serves as an institutional consultant to the Boy Scouts of America. Ms. Banks has also actively participated as a volunteer in voter registration drives and during the summer months served as a tutor for underprivileged children. In addition, she has been active in the Heart Fund, Cancer Fund, Mother's March, Mental Health Drive, and Hospital Aide Society (Bluebonnet Exhibit 2(a)).

30. Ms. Banks has, in the past, received a number of awards from the City of Galveston as well as civic associations and various religious groups. They are as follows: Citizen of the Year for 1973 from the Omega Psi Phi Fraternity; Woman of the Year for 1975 from the Reedy Chapel AME Church; Islander of the Year for 1978 by the City of Galveston; Citizen of the Year 1978 by the Galveston Business and Professional Organization; Administrator of the Year 1978 by the City Council P.T.A.; the Outstanding Black Educator Award for 1979 from the Gallant Men of Galveston, a local black organization; and the Distinguished Service Award for Unselfish Devotion for 1979 from the Galilee Unitee Methodist Church. In 1978, Ms. Banks was made an honorary lifetime member of the National Congress of Parents and Teachers (Bluebonnet Exhibit 2(a)).

Paul Quintero

31. Paul Quintero, who is a director and stockholder of Bluebonnet, will host, produce and direct a weekly two-hour Spanish language program consisting of live entertainment and syndicated movies (Bluebonnet Exhibit 2(d)).

32. Mr. Quintero is a Mexican-American and has resided in Galveston for 22 years. Since 1975, he has produced a daily Spanish language program broadcast from 6:30–8:00 P.M. on station KGBZ(AM), Galveston. He is also a disc jockey, Spanish language newscaster, as well as a host for a local talent program. From 1972 to 1974, Mr. Quintero produced and directed for a local cable television system a Spanish language program, consisting of daily Spanish language soap operas, weekly news and local events, and a weekly one hour live talent show. Mr. Quintero served two terms on the Galveston City Council from 1971 to 1975 (Bluebonnet Exhibit 2(d)).

33. Mr. Quintero is a member of LULAC and has served as vice president, chaplain and chairman of its scholarship fund. In the early 1970's, he was named outstanding LULAC Member of the Year. In addition, Mr. Quintero is a member of Commercintes Unidos, the Mexican-American Chamber of Commerce, and was named outstanding Mexican-American Businessman of the Year for 1973 by that group. Mr. Quintero is also a member of the Galveston County Young Democrats, the local American Legion, where he currently serves as first vice-commander, the Evening Optimists, the Galveston Historical Foundation, the American Heart Association

and the Boys Club. Mr. Quintero attends Our Lady of Guadalupe Catholic Church in Galveston (Bluebonnet Exhibit 2(d)).

Media Interests

34. Bluebonnet has no interest in any broadcast station, cable television system, newspaper or other medium of mass communications (Bluebonnet Exhibit 3(a)).

Raymond Schindler

35. Raymond Schindler has the following media interests and associations: he is president and director and a 52 percent shareholder in Fayette Broadcasting Corp., the licensee of KVLG and KMUZ(FM), La Grange, Texas; president and director and 49 percent shareholder in Ozark Television Co., the licensee of KLMN(TV), Fort Smith, Arkansas; president and director and 83 percent shareholder in Dogwood Broadcasting Company, licensee of KDOC-TV, Nacogdoches, Texas; and a 77 percent shareholder in Sage Broadcasting Co., licensee of KIDY-TV, San Angelo, Texas (Bluebonnet Exhibit 3(a); Joint Exhibit 1).

Jo Edgell Blaskowsky

36. Ms. Blaskowsky is secretary-treasurer and director of Fayette Broadcasting Corp., licensee of stations KVLG and KMUZ(FM) in La Grange, Texas. In addition, she is a two percent stockholder in Ozark Television Co., the licensee of station KLMN(TV), Fort Smith, Arkansas, and holds the positions of secretary-treasurer as well as director; and she has a two percent interest in Dogwood Broadcasting Co., the licensee of KDOC-TV, Nacogdoches, Texas and in Sage Broadcasting Corp., the licensee of KIDY-TV, San Angelo, Texas. Ms. Blaskowsky is treasurer, assistant secretary and director for both Dogwood Broadcasting Company and Sage Broadcasting Co. (Bluebonnet Exhibit 3(a); Joint Exhibit 1).

Frank W. Head

37. Mr. Head owns an 86 percent interest in Mountain Laurel Broadcasting, Inc., which has acquired a 31.33 percent interest in Austin Telecasting, the permittee of a new television station in Austin, Texas. Mr. Head thus has a 26.9 percent interest in the Austin permittee (Joint Exhibit 1).

Special Issues

Main Studio Issue

38. The Mass Media Bureau, formerly the Broadcast Bureau designated an issue against OTRH under Section 73.613 (now Section 73.1125) of the Commission's Rules because of OTRH's failure to show in its application good cause for waiver of the requirement that

the main studio of a television station be located within the city of license (Hearing Designation Order, p. 2). OTRH does not propose to locate an auxiliary studio or any other facility in Galveston.

39. OTRH requests permission to locate its proposed station at 1400 Lundy Lane, Friendswood, Texas (OTRH Exhibit 7), approximately 27.2 miles from the city limits of Galveston and 33.2 miles from the Galveston Post Office (OTRH Exhibit 7; Tr. 93–94), and about 8 miles from the Houston city limits (OTRH Exhibit 7; Tr. 96). OTRH's property in Friendswood which it received as a gift, is an established studio and transmitter facility and was formerly the studio/transmitter site for station KVVV-TV (Channel 16), Galveston, Texas (OTRH Exhibit 7; Tr. 68). KVVV-TV operated under a waiver of Section 73.613 of the Commission's Rules (OTRH Exhibit 7).

40. The proposed studio/transmitter site is not served by direct bus service (Tr. 88). The nearest bus stop is located in Alvin, Texas which is approximately 3.2 miles from the proposed studio site in Friendswood (OTRH Exhibit 7; Tr. 87). Bus service from Galveston to Alvin is provided twice a day in both directions, once in the morning and once in the evening, and roundtrip bus fare is $5.30 (OTRH Exhibit 7; Tr. 104). Limousine and taxi service is also available in the area. One-way fare for the limousine service is approximately $14.00 from Galveston to Clear Lake City, Texas, a town roughly seven miles from OTRH's proposed studio location and the closest bus stop to OTRH's studio, and roundtrip taxi fare from Galveston to the proposed site is approximately $90.00 (Tr. 105–106).

41. Individuals motoring to the studio site in their own vehicles will have a drive of between 30 to 45 minutes from the center of Galveston to the studio site in Friendswood (Tr. 95, 121). Those individuals who make use of OTRH's proposed free transportation service[3] between Galveston and OTRH's proposed studio, assuming the immediate availability of a volunteer driver and vehicle, will require approximately two hours to reach the studio location, based on an hour's driving time from the studio to pick up the individual in Galveston and an hour to return to the studio (Tr. 109). OTRH will also provide free transportation between the studio site and the nearest bus stop, and has agreed to pay the limousine charge upon arrival for those wishing to visit the studio, including, but not limited to those persons desiring to file complaints, to make requests to see the public file, as well as those individuals wishing simply to sightsee (OTRH Exhibit 7; Tr. 87, 107–109, 127).

42. Section 73.1125 of the Commission's Rules requires that a television station maintain a main studio within its community of

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[3] OTRH proposes to offer an unlimited free transportation service between Galveston and the studio site, and it will advertise this service over the air (ORTH Exhibit 7).

license, in the absence of Commission permission predicated upon a showing of good cause to locate elsewhere. The rule is intended as one means of insuring that the needs and interests of the community of license are met and that the station serves as an outlet for local self-expression. *Arizona Communications Corp.*, 25 FCC 2d 837, 839 (1970), *reconsideration denied* 27 FCC 2d 283 (1971). The Commission has stated that the main studio rules ". . .are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve. . .." (*FM-TV Main Studio Moves*, 27 FCC 2d 851, 852 (1971)). A waiver of the rule is not technically required, since Section 73.1125(a)(3), by its own terms, provides for Commission approval of a main studio location outside the community of license upon a showing of good cause.

43. As noted above, OTRH introduced evidence to the effect that a waiver had been granted by the Commission in the case of station KVVV-TV, Channel 16, licensed to Galveston, which had previously occupied the studio site. The Presiding Judge finds, however, that the fact that a waiver was granted in the past to station KVVV-TV, licensed to Galveston, does not, standing alone, support a finding of good cause here, since, as noted by the Bureau, the factual situations surrounding the grant of a waiver in the case of KVVV-TV may very well be totally different from those present here, and policy considerations which led to the grant of a waiver may no longer be relevant. The Presiding Judge concludes therefore that the fact that the Commission granted a waiver in the past does not, in and of itself, meet the good cause requirement set forth in Section 73.1125(a)(3).

44. The proposed site, as noted above, is in excess of 27 miles from Galveston. It requires between 30 and 45 minutes of driving time to reach the site. In addition, it is not readily accessible by public transportation. Although OTRH has agreed to provide what amounts to unlimited free transportation for anyone wishing to visit the station, the service will be dependent on the availability of a vehicle and driver, and will involve a considerable amount of time, since the OTRH vehicle, assuming the availability of car and driver, will have to travel from the studio site to Galveston and back, a trip of at the very least 60 minutes in duration. Although OTRH agrees to pay for a limousine service from Galveston to its studio in Friendswood, this service will also require a considerable amount of time, since the limousine will have to be summoned, thereby lengthening the time required to make the trip.

45. In view of the distance involved from the studio to Galveston and the considerable inconvenience that a visitor would experience, the conclusion is inescapable, in the opinion of the undersigned, that OTRH's proposal to locate its main and only studio at the Friendswood site would involve considerable inconvenience to the citizens of Galveston, and would interfere in a significant way with OTRH's

ability to serve the public. See *Meredith Corporation, KCMO, KCEZ(FM) and KCMO-TV*, 65 FCC 2d 182 (1977). The Presiding Judge concludes, therefore, that OTRH has failed to make a good cause showing for its choice of the Friendswood site as its main and only studio location, and OTRH is found to be technically unfit and it is therefore disqualified.

46. In the event that OTRH's disqualification is reversed on appeal, the special issue designated against OTRH in the Memorandum Opinion and Order released March 3, 1981 (FCC 81M-614) will be addressed, and OTRH's proposal will also be considered comparatively.

The Misrepresentation Issue

47. By Memorandum Opinion and Order released March 3, 1981 (FCC 81M-614), the Presiding Judge added the following issue against OTRH:

> To determine whether George J. Lupo or his guests broadcast false, misleading, or deceptive information, either with respect to the amount of time the proposed station would be on the air, or the location of the proposed station, during the course of "The Old Time Religion Hour" radio program over KXYZ(AM), Houston, Texas on the following dates: May 22, 1980; August 23, 1980; and September 6, 22, 25, 28 and 30, 1980.

48. OTRH is an applicant for Channel 48 in Galveston, Texas (Tr. 157). OTRH proposes to broadcast 81 hours a week or 11 to 12 hours a day (Bluebonnet Exhibit 4(i)). Since 1979, OTRH has produced a nightly program, "The Old Time Religion Hour" on KXYZ(AM), Houston, Texas, hosted by the Rev. Lupo, OTRH's president (Tr. 177–178; OTRH Exhibit 8). The program is broadcast live from 10:00 P.M. to 11:00 P.M. on weekday evenings and from 10:00 P.M. until 2:00 A.M. on Saturday nights and Sunday mornings (Tr. 179).

49. The following statements were made during the broadcast of "The Old Time Religion Hour" on the specified dates. On May 22, 1980, Brother Ernesto Gomez twice spoke of "24-hour Christian television", once saying "[i]t shall be 24-hour Christian TV." To both references, the Rev. Lupo responded "Praise God" (Bluebonnet Exhibit 4(a), pp. 2 and 4), and he ended the program with a request for prayer for "a full-time Christian television station 24 hours a day." (Bluebonnet Exhibit 4(a), p. 35.)

50. During the May 22, 1980 program, the Rev. Lupo also played a prerecorded "message" soliciting funds for OTRH's proposed television station ("300 Club Message"). The message contained references to "a full-time Christian TV station to broadcast the gospel of Jesus Christ 24 hours a day", and to "a full-time Christian television station lifting up Jesus Christ in the Golden Gulf Coast Area." (Bluebonnet Exhibit 4(a), pp. 19–20; Tr. 182–183.) The

message was repeated on August 23, 1980 and on September 6, 1980 (Bluebonnet Exhibit 4(b), pp. 1–2 and Exhibit 4(c), pp. 1–2).

51. On August 23, 1980, the Rev. Lupo prayed for "Channel 48 television that's coming to our area to be a 24-hour full-time Christian television station." (Bluebonnet Exhibit 4(b), p. 2.) Later in the program, Brother Ford stated, while soliciting funds for OTRH's proposed television station, that "Brother Lupo has and is bringing Christian TV to the Golden Gulf Coast area." (Bluebonnet Exhibit 4(b), p. 4.) Brother Ford's message was repeated on September 22, 1980 (Bluebonnet Exhibit 4(d), p. 1).

52. On September 6, 1980, OTRH played a prerecorded message from the Rev. John Stephens soliciting funds for OTRH's proposed station (Tr. 1002). The Rev. Stephens said, "[w]ouldn't it be great to have 24-hour Christian television in Houston? But Christian television is just as expensive as regular television and we won't have it here unless we provide the funds to put it in Houston." He continued with a request for donations, then added, "And 24-hour Christian television will be a reality in Houston, Texas." (Bluebonnet Exhibit 4(c), pp. 2–3.)

53. On September 22, 1980, the Rev. Lupo's son Bob Lupo prayed "to bless this upcoming hearing, Lord, that we will be able to come on the air claiming it by December, Lord, for you, so that we can work better in this, this surrounding areas of Houston." (Bluebonnet Exhibit 4(d), p. 3.)

54. On September 25, 1980, Bob Lupo called in to his father's program. The Rev. Lupo and his son, Bob, discussed OTRH's proposed station, saying in part:

> BOB: The Lord's gonna put Himself in my father's heart, and we're gonna have a Christian [inaudible], Christian TV programs in there so when people turn on their TV there ain't gonna be but one channel—48.
>
> REV. LUPO: [Laughing] Amen. I think I'll go out to Houston and take all the knobs off and set it on 48.
>
> * * * *
>
> BOB: We worked and you worked and the people in Houston that's backed you so far in this has worked and their prayers are not gonna go unanswered.
>
> REV. LUPO: Amen.

(Bluebonnet Exhibit 4(e), pp. 2–3.) Later in the same program, the Brother Eby discussed "where we're at, the Old Time Religion Hour ministry of bringing 24-hour Christian television to this area." He twice more repeated "24-hour Christian television" and referred to the "Golden Gulf Coast area" (Bluebonnet Exhibit 4(e), pp. 4–5)

55. On September 28, 1980, the Rev. Lupo, in the context of soliciting donations for the proposed television station, referred to "Channel 48, a full-time 24-hour Christian TV station." (Bluebonnet Exhibit 4(f), p. 1.)

56. On September 30, 1980, the Rev. Lupo and his son Bob Lupo

again discussed the proposed television station, and both the Rev. Lupo and his son referred to it as the "24-hour Christian" television station. (Bluebonnet Exhibit 4(g), p. 2.)

57. The misrepresentation issue was designated against OTRH because the Presiding Judge initially determined that sufficient questions had been raised with respect to statements broadcast by Rev. Lupo, an officer of OTRH, and his guests concerning the proposed station's location and hours of operation to warrant further inquiry. Upon a review of the evidence of record and the arguments of all parties, the Presiding Judge finds, however, that the necessary criteria for a finding of misrepresentation are not present here, in view of the failure of the evidence to indicate that the speakers intended to mislead the public, had any motive for misleading the public, or that anyone was actually misled by these statements.

58. The Old Time Religion Hour radio program is broadcast from a station licensed to Houston. It is entirely reasonable, therefore, that Lupo and his guests would, when speaking of the proposed station, stress service to Houston, rather than the fact that the station would be licensed to Galveston. Although the use of the phrase "in Houston" might cause some confusion in the mind of a person sensitized to the specialized language of broadcasting, it appears unlikely to the Presiding Judge that the average OTRH listener would interpret the phrase to mean that the proposed station would be licensed to Houston. It is far more likely that a listener would understand the phrase to mean that the proposed television station's programming would be received in Houston. The Presiding Judge concludes therefore that the evidence of record fails to show that Rev. Lupo and his guests, in referring to Houston, intended to mislead or did in fact mislead the listening public as to the proposed station's city of license.

59. With respect to the references of Rev. Lupo and his guests to the station as a full-time 24-hour station, the Presiding Judge concludes that there is no evidence of record to refute OTRH's claim that these statements were made as an expression of a hope or expectation. Furthermore, there is no showing of a possible motive on the part of Rev. Lupo and his guests to deliberately misrepresent the station's proposed hours of operation. Although Alden and Bluebonnet suggest as a possible motive for the alleged misrepresentation that a 24-hour operation would be more attractive to OTRH's radio program listeners and would therefore encourage larger contributions from this group, no evidence has been submitted to warrant such a conclusion. OTRH's contention that the bulk of its contributions does not come from its radio program audience stands unrefuted. In addition, it cannot be assumed that the station's hours of operation would determine whether or not an individual contributes to OTRH or the amount of that contribution. The Presiding Judge concludes, therefore, that the evidence of record fails to show

that Rev. Lupo and his guests intended to deceive or mislead their listening public, and he further finds that the record supports the conclusion that Rev. Lupo and his guests believed at the time that they were broadcasting accurate information to OTRH's radio listeners.

60. In responding to Bluebonnet's direct case dealing with the misrepresentation issue, OTRH submitted partial transcripts for six programs which it represented were aired on September 19, October 1, 2, 4, 9 and 18, 1980 (OTRH Exhibit 8; Tr. 159–163). The transcripts contained statements by Rev. Lupo advising his listeners that the proposed station would be licensed to Galveston and not Houston, and that initially, the station would operate between 11 and 12 hours a day. Four of these tapes were dated prior to the filing of Bluebonnet's October 6, 1980 petition to enlarge issues against OTRH seeking the designation of a misleading statements issue (Bluebonnet Exhibit 10). OTRH submitted the transcripts as accurate demonstrations of what listeners were told with respect to OTRH's application for Channel 48 (OTRH Exhibit 8).

61. Iretta Wooley, OTRH's treasurer and proposed station employee (OTRH Exhibit 5, p. 2; Tr. 307–308), testified that she taped the radio broadcasts in question (Tr. 160), and initially stated that she placed the date on each tape when she removed the tape from the recorder, indicating at the time that this was invariably her practice (Tr. 164). On her return to the witness stand, however, she testified that the pertinent tapes were not the ones dated immediately after recording, but were dated some time afterwards (Tr. 279). She subsequently indicated that after Rev. Lupo's deposition in the Spring of 1981, she searched through her tapes looking for references to Galveston and the station's proposed hours of operation, and that the tapes in question may have been dated then (Tr. 306). Although she testified that all of the relevant tapes were dated when given to Rev. Lupo (Tr. 308), she subsequently mentioned during the course of her testimony that some of the tapes delivered to Rev. Lupo were not dated, and that Rev. Lupo indicated to her that this was "too bad" (Tr. 320–321); that they, presumably Rev. Lupo and Ms. Wooley, "couldn't make up our minds on them" (the dates of the tapes) (Tr. 317); and that she then indicated, in referring to the dating of the tapes, that Rev. Lupo may have had some input (Tr. 322). According to Ms. Wooley's testimony, Rev. Lupo did not ask her to date or misdate the tapes (Tr. 343).

62. Ms. Wooley had, by her own admission, misdated tapes in the past, and knew this when she testified initially (Tr. 282–283). Nevertheless, she indicated that it did not occur to her that she might have made a mistake in dating the tapes until she reviewed them after her original testimony, and then realized that she had been mistaken on the dates (Tr. 301–302).

63. Rev. Lupo submitted the transcripts in question and averred

that they were true and correct to the best of his information, knowledge and belief (OTRH Exhibit 8). When presented with portions of the transcriptions which appeared to refer to Bluebonnet's petition, he denied that the statements were references to that particular petition (Tr. 236–247). However, on the following day, he admitted that some of the dates on the transcriptions were in error, although the content of the transcriptions was correct (Tr. 262). Rev. Lupo indicated that the tape which had been dated October 01, should have been dated October 08, the October 02 tape, October 09, the October 04 tape, October 11, and the October 09 tape, October 16 (Tr. 261-266). Rev. Lupo placed the blame for the errors squarely on Ms. Wooley and asked forgiveness for her (Tr. 266). He did not in any way accept responsibility for the misdating.

64. Rev. Lupo waivered several times during the course of his testimony as to the facts concerning the dating of the pertinent tapes. He initially testified that he believed that the pertinent tapes given him by Ms. Wooley were dated (Tr. 325); then indicated that some were undated (Tr. 325); and later mentioned that he could not remember whether she ever showed him any undated tapes (Tr. 325–326). Finally, he indicated that none of the tapes in question were undated when he saw them (Tr. 328). Rev. Lupo's testimony was confused further when he testified that Ms. Wooley could have requested his assistance in dating the tapes (Tr. 326), although he had testified earlier that Ms. Wooley dated the tapes, and by his later testimony that he didn't think that he dated any of the pertinent tapes (Tr. 326).

65. The Presiding Judge found the demeanors of both Rev. Lupo and Ms. Wooley to be unconvincing. Ms. Wooley's many versions as to when the tapes were dated, in view of the fact that she initially testified unequivocally that they were dated immediately after they were taken from the recorder, raises serious questions as to her candor. Similarly, Rev. Lupo's candor is brought into question by the following: Rev. Lupo's waivering testimony as to whether or not the pertinent tapes were dated when given to him by Ms. Wooley; his inability to recall whether he contributed to the dating of the tapes; and his failure initially to have any doubts as to the accuracy of the dates given to the tapes, when he knew that some of the tapes were dated many months after they were recorded.

66. Rev. Lupo received a copy of Bluebonnet's October 6, 1980 petition to enlarge issues seeking the designation against OTRH of a misrepresentation issue. Although Rev. Lupo and Ms. Wooley were unable to remember whether Ms. Wooley actually saw the pleading, the allegations contained in the pleading were discussed at OTRH's office (Tr. 280, 303). Rev. Lupo was clearly aware, therefore, of Bluebonnet's charges, and Ms. Wooley as well, by her own testimony, knew of the nature of the charges leveled against OTRH (Tr. 304–306). Although the Presiding Judge has found that Rev. Lupo and his

guests did not broadcast misleading information, the fact that the charges were initially made by Bluebonnet and that a misrepresentation issue was designated against OTRH, provided the motive for Rev. Lupo's and Ms. Wooley's lack of candor toward the Commission as well as their deliberate misrepresentations regarding the dates for the tapes in question.

67. The presence of a clear motive to fabricate the dates and the self-contradicting testimonies of Rev. Lupo and Ms. Wooley support the conclusion that Rev. Lupo and Ms. Wooley both knew that the dates of the pertinent tapes were incorrect, or, at the very least, had strong reason to believe that they were in error; that they nevertheless represented to the Commission that the dates of the tapes were true and correct; and that this was done in a deliberate attempt to diffuse the misrepresentation issue by misleading the Commission as to the actual dates of the broadcasts. Although Rev. Lupo and Ms. Wooley subsequently changed their testimonies and admitted that the dates given the tapes were incorrect, these admissions were made only after being presented with information which clearly rebutted their initial contentions that the ascribed dates were true and correct.

68. The Presiding Judge concludes, therefore, that Rev. Lupo and Ms. Wooley's lack of candor and their deliberate misrepresentations demonstrate that they lack the necessary character qualifications to be a Commission licensee. Accordingly, the Presiding Judge finds that OTRH, by the actions of one of its directors and one of its future employees, has demonstrated that it is not fit to be a Commission licensee; and that OTRH is therefore found to be disqualified for failure to demonstrate that it has the necessary character qualifications to be a Commission licensee.

Standard Comparative Issues

69. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) sets forth the two primary objectives toward which the process of comparing applicants should be directed. They are as follows: the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. See *Policy Statement, supra*, p. 394.

Diversification

70. As noted above, neither OTRH nor any of its directors owns any other media interests.

71. Alden has no other media interests. However, its 100 percent owner, Michael Forman, has extensive media holdings. As noted above, Mr. Forman owns controlling interest in a number of television and cable corporations, namely, Robertson Properties, Inc., Alden Communications Corporation, Tavitac Corporation, Consolidated Amusement Company, and Oceanic Cablevision Corpora-

tion. Mr. Forman also owns the fifth or sixth largest motion picture theatre company, with over 300 motion picture theatres located at points throughout the United States.

72. Bluebonnet's 80 percent owner, Raymond Schindler holds a 52 percent interest in KVLG(AM)/KMUZ(FM), licensed to La Grange, Texas; a 49 percent interest in KLMN-TV, Fort Smith, Arkansas; an 83 percent interest in KDOC-TV, Nacogdoches, Texas; and a 77 percent interest in KIDY-TV, San Angelo, Texas.

73. Ms. Blaskowsky, the owner of four percent of Bluebonnet's stock, has a two percent interest in the licensee of KDOC-TV, Nacogdoches, Texas, KLMN-TV, Fort Smith, Arkansas, and KIDY-TV, San Angelo, Texas.

74. Mr. Head, a director, but not a stockholder of OTRH, owns an 86 percent interest in Mountain Laurel Broadcasting, Inc., which has acquired a 331;3 percent interest in Austin Telecasting, the permittee of a new television station in Austin, Texas. Mr. Head thus has a 26.9 percent interest in the Austin permittee.

Integration

75. OTRH argues that it is entitled to a 100 percent integration credit because of Lupo's proposed full-time involvement in the station as general manager. The Presiding Judge notes, however, that OTRH, as a non-profit corporation, is required by Texas law to have at least three directors. By employing the profit corporation analogy, see *Farragut Television Corporation et al.*, 5 FCC 2d 93 (Rev. Bd. 1966), each director is considered as "owning" an equal share of the corporation, namely 331;3 percent, irrespective of any understanding among the directors as to whose voice and opinion shall prevail. Of the three directors, Rev. Lupo is the only one who proposes any involvement with the station. Accordingly, OTRH is entitled to only a 331;3 percent quantitative integration credit.

76. Bluebonnet claims an 85 percent integration credit. Mr. Schindler, who owns 80 percent of Bluebonnet, proposes to work full time at the station as president. Although the evidence of record is vague as to his specific responsibilities at the station, his commitment to work 40 hours a week is clear, and, in view of his past broadcast experience as general manager of KDOG-TV and his position as president and majority stockholder, it appears certain that Mr. Schindler will have a strong voice in the management of the station. Ms. Blaskowsky, a four percent owner of Bluebonnet, will work full time as general manager of the station and general sales manager, both of which are positions of management responsibility at the station. The Presiding Judge concludes therefore that the positions which Mr. Schindler and Ms. Blaskowsky will occupy at the station are of the required degree of responsibility to warrant awarding Bluebonnet a quantitative integration credit of 84 percent.

See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

77. Bluebonnet also claims a one percent quantitative integration credit for Mr. Enriquez, who proposes to work full time directing and producing a job opportunity counseling program. The evidence of record fails to indicate, however, that the position is managerial, or that Mr. Enriquez will have a significant effect on station policy. Accordingly, Bluebonnet's claim of a one percent quantitative integration credit for Mr. Enriquez is rejected.

78. Alden does not propose any integration.

79. The quantity of Bluebonnet's integration proposal exceeds by a substantial degree that of both Alden and OTRH. As found above, Bluebonnet proposes a total integration of ownership into management of 84 percent as compared to OTRH's 331;3 percent and Alden's 0 percent. In addition, Bluebonnet's quantitative integration credit is enhanced by the fact that Mr. Schindler and Ms. Blaskowsky have extensive broadcast experience and both intend to move to the city of license, as well as by the fact that Ms. Blaskowsky, a female, will have managerial responsibilities at the station. Although the Presiding Judge has found that Messrs. Quintero and Enriquez and Ms. Banks will not hold positions of managerial responsibility at the proposed station, the Presiding Judge finds that their proposed participation at the station is entitled to some value when weighing the merits of Bluebonnet's proposal. As noted above, Messrs. Enriquez and Quintero are of Mexican extraction and Ms. Banks is Black All three individuals are directors of Bluebonnet and collectively own five percent of its stock. They are also long-term residents of Galveston who have been actively involved in the affairs of their respective minority communities. Bluebonnet will therefore have the benefit of input from long-term residents of Galveston with a financial stake in the success or failure of the station, all of whom have been actively involved in organizations representing the concerns of their respective minority communities; and the Presiding Judge specifically finds that this adds some value to Bluebonnet's proposal.

80. OTRH's integration credit is enhanced comparatively speaking, to only a slight degree. It is noted that Rev. Lupo does not intend to move to Galveston, has not been involved in civic affairs in Galveston, makes no claim to minority status, and has only limited broadcast experience.

81. Although Alden and OTRH are both entitled to a diversification preference over Bluebonnet, the Presiding Judge nevertheless finds that Bluebonnet's substantial degree of integration, enhanced in the manner described above warrants the conclusion that Bluebonnet's proposal would best serve the public interest.

82. As noted above, Mr. Schindler has controlling interest in Bluebonnet as well as two television stations in Texas and two radio

stations in La Grange, Texas. In addition, he has a 49 percent interest in a television station in Fort Smith, Arkansas. Ms. Blaskowsky has a two percent interest in the same Texas television stations, and in the Fort Smith, Arkansas television station. The closest media interests to Galveston are the radio stations in La Grange, Texas, which is 131.77 miles from Galveston (Bluebonnet Exhibit 3(a)). Although Schindler has controlling interest in several television and radio stations in Texas, in interest in several television and radio stations in Texas, in view of the size of the state and the number of outlets within the state for the expression of a particular point of view, it appears unlikely to the undersigned that awarding an additional license for a television station in Texas to a corporation controlled by Mr. Schindler will create too great a concentration of opinion within that state. Since none of the applicants has any media interests in Galveston, it appears to the undersigned that the more significant factor here is which applicant proposes the best practicable service to the public. Bluebonnet is clearly the preferred candidate under this criterion in view of its substantial integration preference over both Alden and OTRH.

83. It is the Presiding Judge's ultimate conclusion that Bluebonnet's diversification demerit is far outweighed by its substantial integration credit; and that Bluebonnet's proposal will best serve the public interest, and its application will be granted.

Rulings

84. IT IS ORDERED that the Petition to Reopen Record filed by Alden Communications of Texas, Inc. on October 12, 1982 IS DENIED for failure to show good cause.

85. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Reply Findings of Fact and Conclusions of Law filed by The O.T.R.H., Inc., The Old Time Religion Hour, Inc. on April 29, 1982 IS GRANTED, and the supplement and the comments thereto filed by Bluebonnet Broadcasting Company on May 11, 1982 ARE ACCEPTED.

86. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Bluebonnet Broadcasting Company (BC Docket No. 80–447, File No. BPCT-780907KF) for a new television station to operate on Channel 48 in Galveston, Texas IS GRANTED; and the applications of The O.T.R.H., Inc., The Old Time Religion Hour, Inc. (BC Docket No. 80–445, File No. BPCT-5173) and Alden

Communications of Texas, Inc. (BC Docket No. 80–446, File No. BPCT-780907KE) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Fairness Doctrine
License, Renewal of, Subject to Conditions
Personal Attack
Petition to Deny

License renewal application granted for short term subject to conditions. Petition to deny alleging violation of Fairness Doctrine and personal attack rule denied. Allegations failed to raise substantial and material question of fact as to whether renewal would serve public interest, convenience, and necessity.
–Pacifica Foundation

FCC 83–518

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of PACIFICA FOUNDATION For Renewal of License for Noncommercial Station WPFW(FM), Washington, D.C.	File No. BRH-810601VX

MEMORANDUM OPINION AND ORDER

(Adopted: November 8, 1983 Released: November 30, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it for consideration (i) the above-captioned timely-filed license renewal application of Pacifica Foundation ("Pacifica"), licensee of Station WPFW(FM), Washington, D.C.; (ii) a petition to deny that renewal application filed September 1, 1981 by the American Legal Foundation ("ALF"); (iii) an opposition to the petition to deny filed by Pacifica; and (iv) a reply to Pacifica's opposition filed by ALF.

2. ALF alleges that WPFW's license renewal application should be denied because the licensee violated the Commission's Fairness Doctrine and personal attack rule; made deliberate misrepresentations to the Commission in its application for a construction permit for WPFW; violated Section 399 of the Communications Act of 1934, as amended, 47 U.S.C. § 399, which prohibits noncommercial licensees from editorializing; violated Section 1464 of Title 18 of the United States Code, 18 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language"; broadcast programming which was "flagrantly offensive and vulgar"; violated Section 73.3527 of the Commission's rules, 47 C.F.R. § 73.3527, by failing to

annually place in its public file a "problems/programs list"; failed to adequately ascertain the problems, needs and interests of WPFW's service area; violated Section 73.503 of the Commission's Rules, 47 C.F.R. § 73.503, which prohibits announcements by a noncommercial licensee promoting the sale of a product or service; violated federal statutes which prohibit use of funds appropriated by Congress to influence or oppose legislation in Congress; and failed to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).

3. *Fairness Doctrine, Program Content and Personal Attack Allegations*. ALF asserts that WPFW has "consistently and deliberately failed" to present contrasting viewpoints on a number of controversial issues of public importance, including the conflict in El Salvador and U.S. involvement therein; the question of whether the United States is a "racist country"; U.S. development of nuclear weapons; extension of the Voting Rights Act; a Constitutional amendment to give the District of Columbia increased representation in Congress; the Air Traffic Controllers' strike; abortion; and the "New Right." In opposition, Pacifica argues that ALF's Fairness Doctrine allegations are procedurally and substantively deficient.

4. Under the Fairness Doctrine, when a broadcast licensee presents programming on one side of a controversial issue of public importance, that licensee must afford a reasonable opportunity in its overall programming for the presentation of contrasting viewpoints. Broadcast licensees are afforded "wide journalistic discretion" in fulfilling their Fairness Doctrine responsibilities. *Fairness Report*, 48 FCC 2d 1 (1974). Both sides of an issue need not be presented in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station or network, since it is the right of the public to be informed, rather than the right of any individual or group to broadcast his, her or its views, which the Fairness Doctrine is designed to protect. Each licensee must determine whether broadcast material presents, in an obvious and meaningful fashion, one side of a controversial issue of public importance. If so, the licensee selects the spokespersons to present contrasting viewpoints and the formats, scheduling and duration for such presentations. The Commission reviews Fairness Doctrine complaints only to determine whether the broadcaster can be said to have acted reasonably and in good faith. The Commission expects complainants to first contact the broadcaster with detailed complaints to allow the broadcaster to explain its compliance, or its plans for future compliance. In this way it is hoped any controversy may be satisfactorily resolved before the need for Commission involvement. If the complainant is not satisfied with the broadcaster's explanation, then a complaint should be submitted to the Commission. The complainant has the procedural and substantive burden of providing specific, detailed information sufficient to constitute a *prima facie* showing that the licensee has failed to fulfill

its Fairness Doctrine responsibilities, including reasonable grounds for the claim that the station or network broadcast only one side of the issue in its *overall* programming. *Fairness Report, supra.* This properly avoids placing an undue burden upon the broadcaster to respond to every complaint regardless of whether certain requisite information is provided.

5. In view of these requirements, it is clear that the Fairness Doctrine aspects of ALF's petition are deficient in several critical respects. Although ALF identifies eight issues about which it believes WPFW failed to present contrasting points of view, the petitioner indicates that it notified WPFW concerning only the El Salvador issue. Thus, WPFW was not properly afforded an opportunity to demonstrate compliance, or to indicate any plans it may have contemplated regarding the remaining issues. Further, ALF fails to provide the necessary information regarding WPFW's *overall* programming with respect to any of the identified issues. In fact, ALF's description of the period of time it considered is unclear, and ALF consistently fails to specify with sufficient particularity the nature and extent of its viewing habits. For example, with respect to the first three issues focused upon, ALF states "it is merely a small sample of what has been heard by a few individuals in the community who have listened to certain programming of WPFW." In addressing the remaining five issues it states "the extent to which WPFW ignores its Fairness Doctrine responsibilities is perhaps most clearly shown by the results of random monitoring . . . conducted *during the month of August.*" However, a complaint must provide specific information to show that the licensee has failed to afford a resonable opportunity for the presentation of contrasting viewpoints in its *overall programming,* not some finite period of time arbitrarily selected by the complainant. *Northern Plains Resource Council* v. *KGHL,* 59 FCC 2d 482 (1976); *John T. Harrison* v. *WBZ,* 57 FCC 2d 612 (1975), *application for review denied,* 58 FCC 2d 1387 (1976). ALF also submitted affidavits of eight individuals. However, not one affidavit contains sufficient information for either the broadcaster or the Commission to ascertain with any degree of certainty the nature and extent of any affiant's listening habits, or whether WPFW's *overall* programming was actually considered. The *Fairness Report, supra,* at 19, states that "[c]omplainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience." In this regard, the Commission has stated that:

> [I]t did not intend that the mechanical repetition of the words "regular viewer" or the assertion that the complainant "routinely listens to [or views] the news, public affairs and other nonentertainment programs" [footnote omitted] broadcast by the station, without the additional specific information setting forth the "nature and extent" of the complainant's viewing habits . . . would be considered

an adequate basis for a Fairness Doctrine complaint. *John Howard*, 55 FCC 2d 777, 780–81 (1975).

The most detailed, although insufficient, description of listening habits is provided in an affidavit of Paul D. Kamenar and relates solely to the "El Salvador" issue. Mr. Kamenar states, "I have listened regularly over the past several months to WPFW's programming." Clearly, Mr. Kamenar has provided nothing more than a "mechanical repetition" of "regular" listening habits without any description of the "nature and extent" of those listening habits. The remaining affidavits do not even assert what period of time is focused upon, or in any meaningful manner describe the nature and extent of the affiants' listening habits. In addition, *as identified by ALF*, the issues of "race relations" and the "new right" are so amorphous that it is impossible to ascertain what particular controversy regarding these subjects is addressed. Unless a broadcaster is provided with a precise, well-defined identification of broad or complex issues, it may prove unduly burdensome, and indeed impossible, to demonstrate compliance. *American Security Council Educational Foundation* v. *F.C.C.*, 607 F.2d 438 (D.C. Cir. 1979). Accordingly, Pacifica is correct in arguing that ALF's Fairness Doctrine allegations are procedurally and substantively deficient. Therefore, ALF's Fairness Doctrine allegations fail to raise a substantial and material question of fact as to whether grant of WPFW's renewal application would serve the public interest, convenience and necessity.

6. However, in addition to its procedural and substantive arguments, Pacifica provides examples of its programming and describes its programming policies in an effort to "demonstrate that station WPFW has, in fact, aired a variety of viewpoints in connection with the broad areas described by the ALF." In attempting to "demonstrate" that it had aired "a variety of viewpoints," WPFW showed that it, in fact, does not know when or, indeed, whether particular persons or points of view were presented. It asserts with respect to its news programming that it "utilized virtually all reports supplied to it by the [Pacifica] National News Service", and relies heavily on such news reports. However, it continues, "while available station records do not reflect the time and date of broadcast of any particular news item, the [g]eneral [m]anager believes that all, or at least most, of the listed items were aired." In the *Fairness Report*, *supra*, at 20, the Commission stated:

> While this Commission does not require the maintenance of a fairness log or diary, *we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations.* [Emphasis added.]

Thus, although it is not mandatory for broadcasters to maintain a list or log of their controversial public issue programming, the licensee must implement *some* method of keeping track of such programming, particularly when an outside service is relied upon exclusively for news programming, and the broadcaster is otherwise unable to recall specific responsive programming.

7. Furthermore, outside the context of its news programming, WPFW relies substantially[1] upon the call-in feature of several talk shows to show contrasting viewpoints have been aired.[2] WPFW states with respect to one such program, "Salsa de las Americas," that "the dialogue resulting during this call-in program frequently features listeners on all sides of the issues under discussion." Again, the licensee does not indicate whether contrasting points of view on any particular issue were, in fact, presented. Further, while call-in programs may serve as useful vehicles for the presentation of contrasting viewpoints, "broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of" contrasting viewpoints on controversial issues of public importance. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1251 (1949). WPFW's statement in its opposition that "listeners' views are invited and, indeed, welcome" is insufficient without specifying the actual language which constituted an on-the-air invitation.[3] In *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff'd. sub nom. Brandywine-Main Line Radio, Inc.* v. *F.C.C.*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973), the Commission stated:

> The Fairness Doctrine imposes upon licensees a responsibility on behalf of the public's right to hear contrasting views, and this responsibility is not exercised by leaving the expression of contrasting views to such happenstance as the remarks of an unknown person on a call-in program. 27 FCC 2d at 567.

8. Thus, although the information before the Commission is insufficient to find that there has been a Fairness Doctrine violation on any particular controversial issue of public importance, we are concerned about WPFW's apparent lack of affirmative effort to present contrasting viewpoints[4] and its lack of actual knowledge as

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[1] Apparently, the only issue on which WPFW made an affirmative effort to present contrasting viewpoints (outside of its uncertain news reports) was that of U.S. involvement in El Salvador; and such effort on the part of WPFW was made only after receiving a complaint from ALF alleging an imbalance of programming on that issue.

[2] For instance, with respect to "race relations," WPFW states that:

> Since the ALF asserts that at least three editions of these [call-in] programs included some discussion of racism, it is clear that anyone interested in expressing an opinion on some aspect of that topic was given ample opportunity to do so . . . These opportunities, combined with ALF's failure to take advantage of them, totally undercut the ALF's claim that any Fairness Doctrine violation has occurred.

[3] *See Mid-Florida Television Corporation*, 40 FCC 620 (1964).

[4] In this regard, ALF cites Pacifica's statement in its construction permit applica-

to whether it in fact broadcast certain programming upon which it relies in large part for satisfaction of its Fairness Doctrine responsibilities. The fact that "available station records" are inadequate to enable Pacifica to know whether it had broadcast certain nonentertainment programming is even more disturbing in light of our ruling *infra* concerning WPFW's failure to maintain a problems/programs list in its public file as required by the Commission's rules. Accordingly, the grant of WPFW's renewal application shall be conditioned upon Pacifica's establishing some procedures to ensure that it remains cognizant of the controversial issue programming in connection with its Fairness Doctrine obligations. Such procedure might be as simple as contemporaneous notes taken by a program moderator while a discussion is underway. While the Commission wishes to keep the licensee's administrative requirements for the Fairness Doctrine to an absolute minimum, the licensee's obligation to be cognizant of viewpoints broadcast in connection with the Fairness Doctrine requires more than hopeful speculation as to whether contrasting viewpoints were, in fact, aired.

9. ALF also alleges that WPFW has "deliberately slanted and distorted its news coverage" to conform to its "ultra-leftist political philosophy." In support, ALF refers to comments in the "WPFW Paper," a monthly newsletter published by the station, and an on-the-air statement made by a WPFW announcer.[5]

10. The Commission is neither the national arbiter of the "truth" of a news event nor the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air. The Commission does, however, act appropriately to protect the public interest where it receives extrinsic evidence of *deliberate* distortion of news programming. *Hunger in America*, 20 FCC 2d 143, 150 (1969). Such evidence would include testimony, in writing or otherwise,

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tion for WPFW that it would present a program featuring the "Young Americans for Freedom" (YAF), and states that Pacifica never contacted the YAF concerning its participation. ALF characterizes this as a "misrepresentation", as well as evidence of "bad faith" in WPFW's Fairness Doctrine performance. However, as stated above, the Fairness Doctrine does not entitle any person or group to appear on a station to express his, her or its viewpoint. Thus, the presence or absence of a program featuring a particular group is irrelevant to a licensee's fulfillment of its Fairness Doctrine responsibilities. Further, inasmuch as nine years passed between the submission of Pacifica's construction permit application and the commencement of WPFW's operation, the failure of Pacifica to fulfill one programming proposal is clearly not a "misrepresentation" as characterized by ALF.

[5] ALF refers to the following statement made during a discussion of Central America:

> We at WPFW are presenting an *alternative look* at Central America. You can get the *other side* in the *Washington Post*, the *Star*, television, etc. The *point of view* we're presenting is not one you have ready access to. (Emphasis supplied by ALF.)

Petition at 11–12.

from "insiders" or persons who have direct personal knowledge of an intentional falsification of the news. The Commission has emphasized that it is particularly concerned with extrinsic evidence which reveals orders to falsify the news by a licensee, its top management or its news management. *Id.* at 150. In a democracy, dependent upon the fundamental rights of freedom of speech and the press, the Commission cannot authenticate the news that is broadcast, nor should it try to do so. ALF has provided no extrinsic evidence of deliberate distortion, but instead submits general conclusory or speculative allegations. However, the Commission will not infer an intent to distort. In *The Selling of the Pentagon*, 30 FCC 2d 150, 152 (1971), the Commission stated:

> Lacking extrinsic evidence or documents that *on their face reflect deliberate distortion*, we believe that this government licensing agency cannot properly intervene. It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray. (Emphasis added.)

Accordingly, no further action is warranted regarding this aspect of ALF's petition.

11. ALF further asserts that WPFW violates Section 399 of The Communications Act of 1934, as amended, 47 U.S.C. § 399, which prohibits noncommercial broadcasters from "editorializing." In support ALF cites an instance where an unidentified announcer made reference to an "editorial pause." This allegation is obviously without merit and requires little comment. At the outset we note that in *League of Women Voters* v. *F.C.C.*, 547 F. Supp. 379 (C.D. Cal. 1982), the United States District Court for the Central District of California held that Section 399 is unconstitutional insofar as it prohibits noncommercial stations from editorializing on controversial issues of public importance. This matter has been appealed to the Supreme Court. *F.C.C.* v. *League of Women Voters* (Case No. 82-912, filed 12/1/82). However, even if the constitutionality of Section 399 is ultimately upheld, the Commission has consistently defined "editorializing" for the purpose of Section 399 as presentations which "are represented or intended as the official opinion of the licensee or its management," and not "the expression of views on public issues by employees of a noncommercial educational broadcast station . . ." *Accuracy In Media (WNET)*, 45 FCC 2d 297, 302 (1973). Thus, it is obvious that the mere loose use of the word "editorial" by a noncommercial station employee would not constitute "editorializing" within the meaning of Section 399 of the Communications Act.

12. ALF also alleges that WPFW has violated the personal attack rule, Section 73.1920 of the Commission's rules, 47 C.F.R. § 73.1920. ALF states that on August 10, 1981, during a discussion on the issue of whether "the United States is a racist country and. . . the government of the United States actively engages in racist activity"

and/or on "the neutron bomb and America's overall nuclear policy," an individual stated that President Reagan has a "Hilter-type mentality," and that "saying that someone has a mentality like that of Hitler who systematically murdered over six million people in his concentration camps is clearly an 'attack upon the honesty, character, integrity or like personal qualities' of that person." ALF further states that during discussions on President Reagan's budget cuts, "[r]acial motivations for the cuts have been expressed or implied"; and that on August 12, 1981, during a discussion on abortion, an individual stated that "the 'Moral Majority' organization was 'immoral.'" In opposition, Pacifica states that, with regard to the statement that President Reagan has a "Hitler-type mentality," it was "not clear" that the comment was made during a presentation on a controversial issue of public importance, and that the phrase "Hitler-type mentality" was not an attack on honesty, character, integrity or like personal qualities, but was, rather, "a [strong] characterization of the President's political or ideological approach." Pacifica states that the reference to the "moral majority" does not appear to have been directed to any one identifiable group, but rather to the "many and varied conservative groups throughout the country" in the context of "a discussion of the recent conservative tendencies in American society."

13. The personal attack rule, a particularization of the Fairness Doctrine, provides in pertinent part, that:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:
>
> (1) Notification of the date, time and identification of the broadcast;
>
> (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
>
> (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

The Commission's role is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. In order to review the reasonableness of broadcasters' judgments in this area, it is incumbent upon complainants to provide the Commission with certain specific information, including the language of the alleged personal attack and a well-defined description of the issue being discussed when the attack was made. Clearly, in light of ALF's failure to identify any specific comments aired concerning President Reagan's budget cuts, it has not provided sufficient information regarding its "racial motivation" allegation. Thus, no further action is warranted on that portion of ALF's petition.

14. With respect to the remarks concerning the "Moral Majori-

ty," in codifying the personal attack rule with its specific requirements on the licensee, the Commission relied on the fact that there is an identified person or group which is vitally affected and best able to inform the public of a contrasting viewpoint. *In re Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 723 (1967). For the rule to apply, the group allegedly attacked must be such that the licensee could reasonably be expected to know exactly who or what finite group has been personally attacked. This is necessary so that the licensee will be able to comply with the rule's affirmative obligation to transmit to that person or group the requisite information and offer to respond. Thus, the licensee is called upon to make reasonable, good faith judgments on the facts of each situation as to whether a group or person is identified sufficiently to come within the rule. As emphasized above, the Commission's role is not to substitute its judgment for that of the licensee. The burden is on the complainant to establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an *identified* person or group. WPFW states that the "reference to the 'moral majority' does not appear to have been directed to any one identifiable group, but rather to the many and varied conservative groups throughout the country whose influence have been felt in a wide variety of contexts." ALF has provided no information to refute WPFW's judgment or to demonstrate that this reference was reasonably understood to apply to a particular identifiable group. To the contrary, in another part of its petition ALF acknowledges that the remarks were directed generally to "New Right" groups.[6] Accordingly, in view of the absence of any material to show WPFW's judgment to be unreasonable, no further action is warranted on this aspect of ALF's petition.

15. Finally, with respect to the statement that President Reagan has a "Hitler-type mentality," we similarly conclude that ALF has failed to present *prima facie* evidence of a violation of the personal attack rule. As noted, to establish a personal attack violation, complainants must show that the attack occurred *during* the presentation of views on a controversial issue of public importance (47 C.F.R. § 73.1920; *Strauss Communications, Inc.* v. *F.C.C.*, 530 F.2d 1001, 1011 (D.C. Cir. 1976)), or that it "reasonably relates" to such a discussion. *Strauss Communications, Inc.*, 61 FCC 2d 460 (1976). The petitioner here has set forth numerous different descriptions of the issues allegedly under discussion during the program and no facts whatever regarding the context in which the "Hitler-type mentality"

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[6] In its Fairness Doctrine allegations, after stating "the activities of 'New Right' organizations such as the Moral Majority, NCPAC, and the Committee for the Survival of a Free Congress have been the source of widespread attention," ALF asserts that a speaker "vociferously attacked *these groups*" when she stated "they were a 'tiny, immoral minority.'"

remark was made. The affidavit appended to the petition recites simply that at some point during the hour-long call-in show "Upstream," the affiant "heard another caller say that Reagan had a 'Hitler-type mentality.'" By the petitioner's own account, callers and guests on the hour-long program apparently expressed views on a broad range of distinct topics, from the administration's arms control policies generally, to an asserted relationship between the neutron bomb and racial policies, to policies regarding South Africa, and foreign policies regarding terrorists.[7] ALF has not established that all, or even most of the topics discussed on the program are controversial issues of public importance. While the petitioner asserts generally that the program concerned the "neutron bomb and America's overall nuclear policy," this depiction does not coincide with the petitioner's own description of the actual program. In fact, as set forth above, the discussions apparently departed considerably from such topic. The petitioner has provided no evidence that all facets of these issues, as actually discussed on the program, constitute matters of general public controversy. *See American Security Council Education Foundation* v. *F.C.C., supra.* For example, the petitioner makes no attempt to show that the topic of whether administration policies regarding terrorists are racially motivated is a matter of vigorous debate within the community or nation. Accordingly, given the failure to describe with particularity the context of the remark in question, along with the failure to establish that all of the topics discussed were controversial public issues, we conclude that ALF has not sustained its burden of demonstrating a violation of the personal attack rule. In view of the above discussion, ALF's personal attack allegations fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest.

16. *Indecent Language and/or Programming.* In support of its

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[7] The petition and affidavit state, *inter alia*, that:

> the person being interviewed asserted that one of the reasons the neutron bomb was being developed was so that it could be deployed against black people in the United States. . . . A caller to the show stated a similar position contending that the neutron bomb was a "plot against black people" and would be used against them. He stated that the word terrorists was really a code word for black people and the Reagan administration campaign against terrorism was really directed against blacks. He further asserted that the United States would send the neutron bomb to South Africa so that South Africa could launch a nuclear attack against Nigeria without destroying American property in that country.

Petition at 13–14.

> The guest also contended that President Reagan had not developed any substantive arms control policy and that the U.S. was conducting a "propaganda" campaign designed to make nuclear war seem survivable so that the possibility of it occuring would be increased.

Carvin Affidavit at para. 4.

allegation that Pacifica violated 18 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language," ALF states that on January 18, 1979, at 8:20 a.m. "a male announcer repeatedly used such words as 'motherfucker,' 'fuck' and similar indecent language"; and that WPFW's complaint file at the Commission contains two letters which indicate that on October 10, 1979, at 11:50 a.m. "such language as 'motherfucker' and 'shit'" was broadcast; and on May 21, 1978, from 9:30 a.m. to 11:30 a.m., an album which contains the words "fuck," "shit" and "assholes" was broadcast. ALF asserts that "[a]ll of the[se] words 'describe sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium,'" quoting from *Pacifica Foundation (WBAI-FM)*, 56 FCC 2d 94, 98, (1975), *aff'd. sub nom. F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726 (1978). ALF also asserts that WPFW's evening and late-night programming is "indecent" in that "[v]irtually every" broadcast of a program entitled "Shaved Face" includes "so-called 'comedy' albums" which contain "the repetitive use of 'motherfucker,' 'fuck,' 'shit,' and other indecent language"; and other WPFW evening and late night programming contains similar language.

17. In *WBAI-FM, supra*, the Commission defined "indecent" language for the purposes of 18 U.S.C. § 1464 as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 98. In affirming the Commission's ruling the Supreme Court

> relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction . . ." [438 U.S. at 750]. Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." [438 U.S. at 757]. He specifically distinguished "the verbal shock treatment . . ." from "the isolated use of a potentially offensive word in the course of a radio broadcast." [438 U.S. at 760–61]. *WGBH Educational Foundation*, 69 FCC 2d 1250, 1254 (1978).

The Supreme Court's affirmance of the Commission's *WBAI* ruling "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in [*WBAI*] are broadcast. . ." *Id.* at 1254.

18. Applying these principles to the instant case, it is clear that the petitioner has failed to make a *prima facie* case that WPFW has violated 18 U.S.C. 1464. Although ALF cites a number of instances where language similar to that in *WBAI* was broadcast, such occurrences do not amount to the repetitious "verbal shock treatment" of *WBAI*. *WGBH, supra*. Although the use of such language may be more frequent than ALF would like, ALF has not shown that such use was more than "isolated use in the course of" a three year

license term. Accordingly, ALF's allegations concerning the broadcast of "indecent" language by WPFW fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest, convenience and necessity.

19. ALF also asserts that WPFW has broadcast "offensive" and "vulgar" material. Without even addressing the subject matter of the programming which petitioner finds "offensive" and/or "vulgar," it is clear that the Commission "cannot base the denial of a license renewal application upon the 'subjective determination' of a viewer, or group of viewers, as to what is or is not 'good' programming." *WGBH, supra*, at 1251. The Commission has "consistently adhered to the policy that it will not - indeed cannot - insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners." *Sonderling Broadcasting Corp.*, 41 FCC 2d 777, 784 (1973). See also, *WGBH, supra*, at 1252, and cases cited therein. Accordingly, ALF's allegations concerning "offensive" and "vulgar" material fail to raise a substantial and material question of fact.

20. *Ascertainment.* ALF alleges that Pacifica has failed to make "any 'reasonable' efforts to ascertain the needs and interests of the communities outside Washington, D.C. that are within WPFW's listening contours." ALF asserts that Pacifica interviewed only 11 individuals who work or reside outside of the District of Columbia; that certain "major" communities, such as Alexandria, Virginia and Annapolis, Maryland, had been ignored entirely; and that "the Commission has noted on a number of occasions that call-in shows are of little value in ascertaining community needs. . ." ALF also alleges that Pacifica's ascertainment of WPFW's community of license, Washington, D.C., is inadequate because the licensee allegedly failed to interview a sufficient number of community leaders, nor was its survey representative of all significant elements of the community. In support, ALF cites *Ascertainment of Community Problems by Broadcast Applicants* ("*1976 Renewal Primer*"), 57 FCC 2d 418 (1978).

21. In opposition, Pacifica states that in establishing ascertainment requirements for noncommercial broadcasters "the Commission intended to impose on noncommercial radio licensees a substantially less onerous burden tha(n) that which is imposed on commercial licensees," citing in support *Ascertainment of Community Problems by Noncommercial Educational Broadcast Licensees* ("*Noncommercial Renewal Primer*"), 58 FCC 2d 526, 537 (1976), where the Commission stated that noncommercial radio licensees could ascertain "by any reasonable methods." Pacifica asserts that it has met its ascertainment obligations by "maintaining close continuing contacts with representatives of many significant socio-economic elements throughout its service area." Pacifica also cites its frequent call-in programs and a survey of 300 residents of Washington, D.C.,

conducted under the auspices of Howard University. Finally, Pacifica states that it has not totally ignored the communities outside of Washington, D.C., but, "given its limited resources, the licensee has determined that it should direct the main thrust of its ascertainment efforts toward its community of license."

22. As Pacifica correctly observes, in establishing ascertainment obligations for noncommercial broadcasters, the Commission specifically declined to institute detailed ascertainment requirements or procedures such as those required at the time for commercial licensees.[8] Indeed, due to the fact that the "educational radio service is not nearly as developed as its television counterpart," and the "financial support for educational radio [is]. . .less firm than for educational TV," the Commission determined that noncommercial radio licensees should not even be subject to the reduced ascertainment procedural requirements it was establishing for noncommercial television licensees. *Noncommercial Renewal Primer*, *supra*, at 536. Thus, noncommercial licenses were merely directed to "ascertain by any reasonable methods designed to provide them with an understanding of the problems, needs and interests of their service areas." *Id.* at 537.[9]

23. In the absence of specific required ascertainment procedures, a licensee must make "an honest and conscientious effort to ascertain the problems of its service area." *The Evening News Association*, 35 FCC 2d 366, 387 (1972). The Commission "can fault a noncommercial educational licensee's ascertainment efforts in the absence of required procedures only if, in the aggregate, the procedures employed by the licensee could not be said to constitute such 'an honest and conscientious effort.'" *Georgia State Board of Education*, 70 FCC 2d 948, 950 (1979). In view of the ascertainment efforts cited by Pacifica in its renewal application and its opposition to ALF's petition to deny, it cannot be said that Pacifica has failed to make "an honest and conscientious effort" to fulfill its ascertainment obligations as established for noncommercial radio licensees in *Noncommercial Ascertainment Primer*, *supra*.[10] Accordingly, ALF's

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[8] Detailed ascertainment procedural requirements have since been eliminated for commercial radio licensees. See *Deregulation of Radio*, 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd. in part and remanded in part sub nom. Office of Communication of the United Church of Christ, et al.* v. *F.C.C.*, __ F 2d __ (D.C. Cir. No 81-1032, May 10, 1983). (The remanded portion did not affect the elimination of detailed ascertainment procedures for commercial radio licensees).

[9] Thus, ALF's reference to ascertainment procedures and requirements established for commercial broadcasters in the *1976 Renewal Primer*, *supra*, is clearly inapposite.

[10] In the *Noncommercial Ascertainment Primer*, *supra*, at 536–37, the Commission retained for each noncommercial radio licensee the secondary obligation to ascertain areas outside its community of license but within its broadcast signal contours. While WPFW's ascertainment outside of Washington, D.C., has been

allegations concerning WPFW's ascertainment fail to raise a substantial and material question of fact.

24. *Public File Requirements.* ALF observes that Section 73.3527(a)(7) of the Commission's rules provides that every year "on the anniversary date on which the station's renewal application would be due for filing" each noncommercial broadcast licensee must place in its public inspection file "a listing of no more than ten significant problems and needs of the area served by the station during the preceeding twelve months" together with "typical and illustrative programs or program series which were broadcast during the preceeding twelve months in response to those problems and needs," and states that WPFW apparently did not comply with this rule because the station answered the question on the renewal application concerning placement of the list in the public inspection file by stating that it had been "unable to locate" its problems/programs list for the first two years of the license term. In opposition, Pacifica states that although it was "unable to locate" the 1979 and 1980 lists, they "may have been prepared and placed in the public file at the appropriate times, only to be misplaced later," and that the station took steps "to assure substantial compliance" by "reconstruction" of the lists from station records.

25. The requirement of Section 73.3527(a)(7) is clear, simple and unequivocal: every noncommercial licensee "*shall maintain* for public inspection a file containing," among other information, the above described problems/programs list. In response to an obvious failure to "*maintain*" a problems/programs list for two consecutive years, Pacifica offers nothing more than speculation to the effect that the problems/programs list requirement "may have been" complied with, and the lists "may have been . . . misplaced" later. The purpose for placement of the problems/programs list in a station's public file is to provide the public with timely information at regular intervals throughout the license period as to the licensee's programming. *1976 Renewal Primer*, *supra*, at 432–33.[11] "Substantial compliance" is not achieved by "reconstruction" of such lists for the purposes of filing a license renewal application one or two years after the lists were supposed to be placed in the public file. Inasmuch as it is obvious from its renewal application and the pleadings in this proceeding that WPFW has presented a substantial amount of non-entertainment, news and public affairs programming, we do not believe that WPFW's failure to maintain a problems/programs list

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minimal, its decision to "direct the main thrust of its ascertainment efforts towards its community of license" does not render its ascertainment efforts inadequate.

[11] Although this *Order* dealt with the ascertainment and public file requirements of commercial licensees, the reason for maintaining a problems/programs list is the same in both services.

in its public file raises a substantial and material question of fact concerning its license renewal.[12] However, we are concerned with WPFW's compliance with its record-keeping obligations. As stated above, the requirement for the maintenance of a problems/programs list is clear, simple and unequivocal. In view of WPFW's obvious failure to maintain this list, and its inability to state with any degree of certainty whether particular programming has been broadcast in connection with its Fairness Doctrine responsibilities (See paras. 6–8, *supra*), it appears that WPFW's record-keeping practices are, at best, haphazard. Our concern is heightened by the fact that licenses are now issued for seven year terms. It is apparent that the station's management did not become aware of the requirement for, or absence of, its problems/programs lists until it was time to file a license renewal application. Since the past license term was for a three year period, WPFW had to "reconstruct" only two problems/programs lists. Had the license term been for seven years rather than three, WPFW would have been hard pressed indeed to "reconstruct" problems/programs lists for all of the intervening years, especially in view of the licensee's inability to cite with any degree of certainty or specificity the programming which it had broadcast in connection with the issues enumerated in the Fairness Doctrine portion of this *Order*.

26. In addition, the lack of awareness on the part of the station's management as to the requirement for a problems/programs list, their substantial failure to make an affirmative effort to present contrasting viewpoints under the Fairness Doctrine, and their lack of actual knowledge as to whether certain programming was or was not in fact broadcast, causes us to question the amount of supervision and control which Pacifica, as licensee, exercises over the individuals who are conducting the day-to-day operation of the station. It is well established that each licensee is responsible for the acts of the employees charged with the management of such operation. See, e.g., *The McLendon Corporation*, 18 FCC2d 224, 228 (1969); *Continental Broadcasting, Inc.*, 15 FCC2d 120 (1968); *International Broadcasting Company*, 19 FCC2d 793 (1969); *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962). As we stated in *Walton Broadcasting, Inc.*, 78 FCC2d 857 (1980), a licensee which delegates authority to supervise station operations must be held responsible for any failure to comply with the Commission's rules or policies under the concept of "respondent superior." Since the deficiencies in this case are

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[12] As stated above, the purpose of the requirement to maintain the list is to provide the public with information concerning the licensee's programming. The Commission has received no complaints that any individual sought the problems/programs lists and was denied access, or that any individual lacked information concerning the content of WPFW's programming. Indeed, it is apparent that ALF become aware of WPFW's failure to maintain its problems/programs list not because of any thwarted attempt to inspect the station's public file, but because of WPFW's admission in its renewal application.

minor, they do not raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest. However, reporting conditions shall be imposed so that Pacifica will establish record-keeping procedures which will ensure its employees' knowledge of and compliance with the Commission's rules and policies.

27. ALF next charges WPFW with commercialization in violation of Section 73.503(d) of the Commission's rules. ALF states that Section 73.503(d) provides that "no announcements promoting the sale of a product or service shall be broadcast in connection with any program," and that an employee of WPFW twice made announcements promoting an "oldies" show which he produced at a local club. ALF asserts that on both occasions WPFW was warned by the Commission's Complaints and Compliance Division that this was a violation and was advised to adopt procedures to prevent its recurrence. ALF avers that despite those warnings, another announcer for WPFW subsequently urged attendance at a benefit for "RAP, Inc.", and yet another announcer who was interviewing a band asked a band member where interested listeners could purchase their record. ALF further contends that WPFW violated the rule by encouraging contributions and station membership in exchange for a "discount card" which entitles the holder to discounts at certain stores that are "promoted" by WPFW. ALF characterizes this discount card as a "continuous promotional device" for goods and services at selected stores. In opposition, Pacifica states that the two alleged instances of "commercialization" concerning the "oldies" show have been disposed of by action of the Commission's staff. It asserts that the other two occasions cited, the announcement of a benefit event and the inquiry into the purchase of a program guest's recording, are clearly within the stated limits of Section 73.503(d). It finally contends that the discount card it provided to the station's constributors was a "premium" which the station is permitted to describe to listeners.

28. Two of ALF's allegations of commercialization by WPFW have already been considered and disposed of by the Commission with no adverse action or finding against Pacifica.[13] Those episodes do not warrant further consideration. ALF's contentions concerning WPFW's promotion of a public benefit event and announcing the availability of an interviewee's record album are based on its apparent misunderstanding as to the current rule. Section 73.503(d)

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[13] On two occasions an unpaid announcer urged attendance at an "oldies" show in which the announcer had a financial interest. On the first occasion Pacifica took prompt corrective action to prevent the further occurence of such a violation. On the second, Pacifica terminated the program and the announcer. In response, the Commission's staff expressed its satisfaction with this resolution of the problem, and its expectation that Pacifica would continue its corrective procedures to prevent any further violation. Letter from Stephen Sewell, Complaints and Compliance Division, March 11, 1981. No further violations have occurred.

states now, as it did at the time of the announcements (August, 1981) and at the time ALF submitted its petition to deny (September, 1981): "No announcement shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees." At the time that provision was adopted, the Commission specifically stated that licensees may describe community events "in any manner they choose, including mentioning price and urging attendance." *Public Broadcasting Service-Second Report and Order*, 86 FCC 2d 141, 151 (1981). According to the affidavit of WPFW's general manager, the station received no consideration for either announcement. ALF provides no evidence or argument that Pacifica did receive such consideration. Therefore, these announcements did not violate any Commission rule. Finally, WPFW's offering of a discount card to area merchants as a premium for subscribers to the station does not violate the rule. WPFW is permitted to describe such premiums to its listeners in order to establish their values, and in so doing it may identify the participating businesses.

29. *Statute Violations*. ALF charges Pacifica with violation of federal anti-lobbying laws, 18 U.S.C. § 1913, and Section 607(a) of the Treasury, Postal Service and General Government Appropriations Act of 1979. Those laws prohibit the expenditure of any federally provided finds on any activity designed to influence a Member of Congress concerning legislation.[14] ALF asserts that in the *WPFW Paper*, the station once urged its listeners to write to Congress to protest proposed legislation concerning public stations, including cutbacks in funding for public stations. ALF also charges WPFW with violating Section 504 of the Rehabilitation Act of 1973[15] by failing to provide accessibility to its studios and its bathroom facilities to wheelchair-bound persons. It asserts that access to the building in which WPFW is located is by outward-swinging doors, and that the bathroom on one floor is located in a corner and does not have facilities for the handicapped. ALF argues that compliance

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[14] 18 U.S.C. § 1913 states: "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress." Section 607(a) Treasury, Postal Service and General Government Appropriations Act of 1979 (Public Law No. 95–429, 92 Stat. 1001, 1016) states: "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

[15] Section 504 provides that any program or activity receiving federal financial assistance shall not exclude a handicapped person due to his handicap. 29 U.S.C. § 794.

with the Rehabilitation Act was established as a relevant renewal consideration in *Gottfried v. F.C.C.*, 655 F.2d 297 (D.C. Cir., 1981).

30. With regard to the anti-lobbying laws cited by ALF, Pacifica responds that the monies received by WPFW from federal sources are grants for specific projects; that all such federal money is in fact spent on these projects; and that no federal funds are spent on the *WPFW Paper*. With regard to the Rehabilitation Act, Pacifica recognizes that its building's doors swing out and that its second floor bathroom is in a corner. It asserts, however, that ALF has not demonstrated that these features have a discriminatory effect. It avers that a wheelchair-bound quadriplegic has visited the studio facility with no problem or complaint, and points out that a blind person has worked at the station and encountered no difficulty. Pacifica further notes that during the summer of 1980 a number of mentally retarded persons worked at the station in connection with a city-sponsored summer employment program. Pacifica also contends that it is not within the Commission's expertise or jurisdiction to make a determination regarding possible discriminatory effects of WPFW's physical structure, distinguishing this case from *Gottfried, supra*, which involved a question concerning the programming responsibilities of licensees. Finally, Pacifica points out that in *Gottfried*, the Court found that Section 504 only requires "reasonable accommodation," so that the hardship on the licensee must be weighed against the difficulty for the handicapped in determining whether a violation exists. In this regard, it asserts that it cannot force the building owner to effect structural changes, and that if they were made, substantial burdensome expenses would be passed on to WPFW.

31. It appears from an unchallenged affidavit submitted by Pacifica that the monies received by WPFW from federal sources are earmarked for specific projects on which they are spent, whereas the *WPFW Paper* is funded by listener contributions. Accordingly, it is clear that no activity prohibited by federal anti-lobbying laws has occurred. ALF has also failed to demonstrate any violation of Section 504 of the Rehabilitation Act of 1973 by Pacifica. ALF has not supported its allegation that wheelchair-bound persons are denied ready access to WPFW's facilities. There is no evidence that any handicapped person has ever been denied access to WPFW's facilities for employment or participation in member activities. On the contrary, from the evidence concerning the involvement at the station of handicapped persons, it appears that WPFW shows a particular sensitivity to their needs. Thus, these allegations fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest, convenience and necessity.

32. Accordingly, IT IS ORDERED, That the petition to deny filed by the American Legal Foundation IS DENIED.

33. IT IS FURTHER ORDERED, That the renewal application of Pacifica Foundation for station WPFW(FM), Washington, D.C., IS GRANTED, TO EXPIRE ON October 1, 1988, SUBJECT TO THE FOLLOWING CONDITIONS:

(a) THAT, the licensee shall establish procedures to ensure that it complies with the requirements of Section 73.3527(a)(7) of the Commission's rules concerning the maintenance of a problems/programs list in its public inspection file;

(b) THAT, the licensee shall establish procedures to ensure that it remains cognizant of the controversial public issue programming in connection with its Fairness Doctrine obligations;

(c) THAT, within 30 days of the release of this Order, the licensee shall submit to the Commission a report containing the following information:

(i) a narrative statement describing the procedures established in compliance with conditions (a) and (b), *supra*; and

(ii) copies of the problems/programs lists which the licensee was required by Section 73.3527(a)(7) of the Commission's rules to place in WPFW's public file on October 1, 1982, and October 1, 1983; and

(d) THAT, on October 1, 1984; October 1, 1985; October 1, 1986; and October 1, 1987, the licensee shall submit to the Commission copies of the problems/programs lists which it is required by Section 73.3527(a)(7) of the Commission's rules to place in WPFW's public file on those dates.

34. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send, by Certified Mail - Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Domestic Public Land Mobile Radio Service Rules, Editorial Update

Commission in a Report and Order adopted new rules for Public Mobile Service, Part 22, New rules reduce costs for applicants and expedite administrative processes related to Public Mobile Service.

–*Public Mobile Service.*

CC Docket No. 80–57

FCC 83–476

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision and Update of Part 22 of the Public Mobile Radio Services Rules	CC Docket No. 80–57

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: October 19, 1983 Released: December 19, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

Background

1. On September 8, 1982 the Commission released a Notice of Proposed Rulemaking[1] (NPRM) proposing to revise Part 22 of the rules (Public Mobile Radio Services). The revisions were proposed in order to rewrite the rules in plain language, to bring the text of the rules up to date with existing technology, and to add or revise definitions to explain more fully the meaning of certain rules.[2] Also

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[1] 47 Fed. Reg. 43842 (October 4, 1982). The Commission previously requested general comments and suggestions for rule revisions, *Notice of Inquiry*, CC Docket 80–57, 45 Fed. Reg. 14074 (March 4, 1980).

[2] We incorporate by reference other proceedings which have revised certain sections of Part 22 but which we do not address here. For instance, CC Docket 79–378 (cellular rules), 86 FCC 2d 469 (1981), 89 FCC 2d 58 (1982), 90 FCC 2d 571 (1982); CC Docket 80–189, 49 RR 2d 1541, 46 Fed. Reg. 38509 (July 28, 1981), recon. granted in part, FCC 82–342, 47 Fed. Reg. 34561 (August 10, 1982); Docket No. 19327, Second Report and Order, FCC 82–343, 47 Fed. Reg. 35568 (August 10, 1982); General Docket 80–183, 89 FCC 2d 1337 (1982), recon. (part 1), FCC 82–503, released November 16, 1982, recon. (Part 2) FCC 83–146 released May 4, 1983; CC Docket 20870, Third Report and Order, FCC 83–53, released February 16, 1983, Further Notice of Proposed Rulemaking, FCC 83–38, released February 14, 1983; CC Docket 83–371, FCC 83–276, released June 9, 1983; Gen. Docket 81–768 (lottery proceeding), 48 F.R. 27182 (June 13, 1983); and others.

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we hoped to eliminate or reduce government regulation in favor of the self regulation characteristic of a competitive marketplace. In this Report and Order we adopt new rules for the public mobile services. In keeping with our objectives we have also revised the forms applicants are required to file, eliminated unnecessary ones and simplified the ones we are retaining. After careful consideration of the pleadings and officially noticeable information, we conclude that this revision of the rules, substantially as proposed, benefits the public interest.

Discussion

2. Comments were filed by numerous parties, listed in the attached Appendix A. We have reviewed and considered all the comments submitted by the parties. The comments were generally in favor of the revision of Part 22; however, they addressed various matters in the proposed rules and suggested a number of changes, which we will discuss in the following paragraphs.[3] Our discussion will address the rule sections sequentially. We deal with the more controversial matters in some detail. Although we dispose of minor matters with only brief mention, we have carefully considered all comments and arguments.

3. *Definitions.* We proposed to update the definitions in Section 22.2 of our rules, many of which are obsolete, and we proposed to correct various definitions which are ambiguous. The comments suggested changes to some of our proposed definitions. Our disposition of those suggestions appears below.

4. Peters suggested that the definition of "channel occupancy time" should include any setup or overhead time for a particular call or message, e.g., transmission of a pager or mobile unit number. Peters also suggested including paging units in the definition of public land mobile service, and commented that the term "reliable service area" did not reflect the 20 mile radius service area for 900 MHz paging. Comp Comm also alleged that the definition of reliable service area is not technically accurate and that it should be expanded.

5. We will clarify our definition of channel occupancy time. The definition will be "the total time a channel is utilized for the transmission of communications, including necessary signaling." Our definition thus includes any setup time or transmission of a pager or unit number. We need not include "paging units" in the definition of public land mobile service because the definition is all inclusive. Moreover in General Docket No. 80–183[4] we amended Section 22.2 to include definitions for the paging services which are

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[3] The staff has compiled a summary of all the comments. This summary has been made a part of the record in this proceeding and is available for public inspection.

[4] 89 FCC 2d 1337 (1982).

part of the rules. We will clarify the definition of reliable service area to include the exception in the 900 MHz paging service and to make the definition more precise by citing Section 22.504, which defines actual field strength contours. The definition adopted for reliable service area is: "the area specified by the field strength contour as defined by Section 22.504 of the rules and FCC Report R-6406 (Technical Factors Affecting the Assignment of Facilities in the Public Land Mobile Service), within which the reliability of communication service is 90%, i.e., the area within which nine out of every ten calls initiated by the base station can be satisfactorily received by the mobile unit." For 900 MHz paging facilities, see "protected service area."[5]

6. We proposed to add a definition for special temporary authority (STA) to read as follows: an authorization granting permission to operate a station for up to 90 days when circumstances require immediate or temporary operation of a station. We also proposed to delete the definition of "general communication" because it could be replaced by "two-way voice communication" which is the term currently used.

7. Peters and Offshore Telephone commented that the definition of special temporary authority does not, but should, reflect the changes concerning temporary authorizations recently enacted in the Communications Amendments Act of 1982, Pub. L. No. 97–259. Telocator suggested we retain the definition for "general communication", since it still holds legal significance.

8. In view of the 1982 amendments to the Communications Act we will drop the reference to 90 days from the definition of special temporary authority and insert the language of that Act. Also in accordance with this new law, in CC Docket No. 83–371, *Common Carrier and Satellite Licensing Procedures*, FCC 83–276 released June 9, 1983, Section 22.25 has been amended. Thus, an STA is an authorization granting permission to operate a station when circumstances require immediate or temporary operation. We disagree with Telocator that the definition of "general communication" should be retained in the rules. As we stated in the NPRM, the term "two-way voice communication" replaces "general communication" and "two-way voice communication" is more commonly used. We see no merit to Telocator's contention that keeping the term "general communication" will clarify or help understand the 1982 amendment to Section 331(c)(1) of the Communications Act.

9. In the NPRM we proposed to rewrite the definition of offshore central station as "a fixed station in the offshore radio service for interconnecting offshore subscriber stations with each other and by means other than offshore radio with the land telephone systems."

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[5] We added a definition for protected service area as follows: A fixed 20 mile radius from a 900 MHz paging transmitter which is protected from harmful interference.

Offshore Telephone commented that this definition is ambiguous because it uses the term "subscriber stations with each other". According to Offshore, the function of the central station is not to provide interplatform communications but rather to act as the link between terminal subscriber stations and the nationwide toll network.

10. We agree with Offshore Telephone that the proposed definition of "offshore central station" was ambiguous and we have clarified it. The new definition reads as follows: "a fixed station in the offshore radio service with facilities for interconnection with the land telephone system."

11. Comp Comm also suggested adding a definition for "interference free service area." It suggested the following: "denotes that area within the field strength contour determined in accordance with § 22.504 in which the ratio of desired-to-undesired signal is equal to or greater than R in FCC Report R-6406, equation 8." We agree and are including a definition to this effect. We have also included a definition for maps required to be submitted in this Part. We deem this necessary because many of the maps submitted with applications are useless because they contain no scale or latitude or longitude.

12. We proposed to conform our terminology to that commonly used in the industry by adding a definition of the term "wireline common carrier", defining them as common carriers which are in the business of providing local exchange telephone service. Various comments addressed the proposed definition for wireline carrier. Offshore Telephone suggested changing it to: "the business of providing local telephone service directly through the ownership of the end-user telephone plant." USITA also suggested keeping "wireline" or "landline" in the definition. Peters suggested adding "wireline" to the definition. All Florida suggested that the definition refer to the use of wire or cable to connect telephones to local exchange to distinguish wireline carriers. AT&T in reply comments objected to Offshore's and All Florida's recommendations and suggested that the definition be clarified by preceding "local exchange telephone service" with "landline". MCI in reply comments also suggested clarifying the definition by adding "wireline". The comments note that with our proposed definition, radio common carriers offering cellular service could be classified as wireline carriers.

13. We have decided to include in the definition of "wireline common carrier" the term "landline." Thus, a wireline carrier is in the business of providing landline local exchange telephone service.[6]

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[6] This definition is consistent with the Commission's determination in Xerox Corporation, 90 FCC 2d 547 (1982), that MCI is not a wireline carrier.

We believe this definition will eliminate ambiguity.[7]

14. *Standard Application Forms, Section 22.9, two-step application process*. In the NPRM we proposed to revise our forms and also to eliminate the two-step application process (construction permit-license to cover constructed facilities) and instead require applicants to submit one Form 401 for a license under which applicants will construct and perform tests of the facilities. Upon completion of the tests, the license holder would notify the Commission that the tests are completed and that the facilities are constructed and operating in conformance with the specifications on Form 401. If the constructed facilities differ in a minor way from the specifications in the Form 401, the license holder would indicate the changes as part of the notification. We proposed a Form 408 for this notification. A copy of this Form 408, retained by the licensee along with the permit, at this point would constitute the license.[8]

15. TDS, Hill, AT&T and All Florida supported the proposal. AT&T agreed, provided that authorizations are required prior to construction and operation of proposed new facilities or major modifications to existing facilities. AT&T stated that P.L. 97–259, the Communications Amendments Act of 1982, permits the Commission to eliminate construction permits where common carriers are involved. USITA, in light of this new law suggested that the two-step license process could be totally eliminated, and replaced by a simple notification (Form 489).

16. We will adopt the changes proposed. Because the current requirement that applicants obtain authorization prior to construction guarantees efficient spectrum allocation and utilization, we find it is in the public interest to retain that requirement for the time being. See 47 U. S. C. § 319(d). Nevertheless, in accordance with the

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[7] MCI also suggested including a definition for radio common carriers and changing the definition of Public Land Mobile Service to "a common carrier public communication service between land mobile stations." The term "radio common carrier" was defined in Docket 80–183, 89 FCC 2d 1337 (1982), *recon.* (Part 1), FCC 82–503, released November 16, 1982, *recon.* (Part 2), FCC 83–146, released May 4, 1983. We are making minor corrections to this definition. Our proposed definition for public land mobile service to replace our previous phrase Domestic Public Land Mobile Radio Service is "a public communication service for hire between land mobile stations wherever located and their associated base stations which are located within the U.S. or its possession or between land mobile stations in the U.S. and base stations in Canada." We have considered MCI's suggestion to change the definition of public land mobile service and decided to adopt our definition as proposed. We are not persuaded that our definition is not clearly distinguishable from the private services, such as Specialized Mobile Radio Services (SMRS). *See* Pub. L. No. 97–259, Section 120. Pursuant to Pub. L. No. 97–259 we have modified our definition of mobile station.

[8] We have effected a further consolidation of forms in this Report and Order. Basically, we will use only two forms in this service from now on: the Form 401 for initial authorizations and major modifications; and the Form 489 for everything else. Due to administrative requirements the number proposed for Form 408 has been changed to Form 489.

spirit of P. L. 97–259, Section 119, we also believe that elimination of our dual licensing scheme in these services is in the public interest. Therefore, we will eliminate the two step application process, the application for a construction permit and application for a license to cover or operate. Applicants will be required to file a Form 401 (Application for New or Modified Radio Station Authorization) for a license. After completing construction they may merely notify us on a Form 489. We will not issue a separate authorization to operate the constructed facilities. A copy of the filed Form 489 and the license will constitute the operating authority. Cellular radio service licensees shall file a Form 489 also to notify us that they have completed construction. However, their radio station authorizations will automatically become effective thirty days after the filing date of the Form 489, unless the Commission advises the grantee to the contrary within thirty days after receipt of the Form 489, or unless a petition to defer is filed within the thirty day period. The cellular licensee, unlike other Part 22 licensees, may not render service to the public until its authorization becomes effective. *Advanced Mobile Phone Service, Inc.* (*Chicago Order*), 91 FCC 2d 512 (1982), at para. 16.

17. If the holder of an authorization does not complete construction within the time period provided by the applicable rules, the authorization will automatically expire, unless a timely application for an extension of the term to complete construction is filed (FCC Form 489). If the Form 489 does not comply with the rules, for instance if it proposes major modifications, the authorization will automatically expire also.

18. *Number of land mobile units served, Section 22.9(c) and (d).* We proposed to eliminate the requirement that an applicant estimate the number of land mobile units to be served during the license term when filing a Form 401. The previous rule also required that when a carrier was close to surpassing the number authorized (estimated), it had to file a Form 403 requesting authorization to serve additional mobile units. We considered this procedure unduly burdensome. We proposed that the individual land mobile units served by a carrier be considered associated with the carrier's blanket authorization.

19. Comp Comm, Telocator and USITA filed comments with regard to both subsections. USITA suggested with respect to subsection (c), reassessing the rule change because the annual report, Form L, is no longer required, and thus, the regulatory need for "a number of mobile units" showing should be examined. Telocator supported elimination of the estimate of number of mobile units to be served and the requirement to submit a Form 403 when the actual number exceeded the estimate. However, Telocator argued that, since the proposal relied on Form L and this reporting requirement has been eliminated, a simplified Form L should be retained. Comp Comm also suggested adoption of a new annual reporting procedure

if there is to be a public record of number of units served by each licensed facility on an annual basis. It is Comp Comm's view that retention of the requirement of maximum number of mobiles authorized is not an acceptable substitute for reporting the actual number served.

20. We will adopt the rule as proposed. As we stated in CC Docket No. 82–85, FCC 82–451, released October 27, 1982, we determined to eliminate the annual reporting requirement (Form L) for the industry and rely on special requests as necessary. We will not revisit the reasons here except to state that the collection effort is unnecessarily burdensome. Similarly, the requirement that licensees estimate, the number of mobiles they intend to serve and continuously update that estimate is an unnecessary burden. That type of information is not frequently used by the staff. Accordingly, even though that information will no longer be available from the Form L, we do not believe it is in the public interest to continue to require licensees to submit those estimates. As we have previously stated with respect to the information previously contained in the Form L, the Commission can always obtain that data through special requests. Finally, we also reject Telocator's and Comp. Comm's proposal to maintain an annual reporting procedure for the actual number of units served. Telocator's request has been previously addressed by the Commission and rejected. *Id*, and *Petition for Reconsideration of Amendment of Annual Report of Licensee in Public Mobile Radio Services (FCC Form L)*, CC Docket No. 82–85, FCC 83–142, released April 19, 1983.

21. With regard to proposed subsection (d), modification of authorization not requiring a construction permit, Comp Comm recommended eliminating (d)(5) because a change of frequency is not a minor modification. It also suggested eliminating this item from proposed Form 489. Comp Comm asserted that a frequency change requires detailed co-channel study and public notice. It also suggested clarifying subsection (d)(4) which proposed that correction of coordinates are minor modifications to reflect the fact that the engineering corrections or changes permitted should be limited to those that do not change the values and/or geographic location of the service/interference contours originally submitted. Comp Comm also suggested that Form 489 be accompanied by a detailed engineering showing demonstrating that the co-channel interference information originally submitted is not adversely affected by the corrections or changes.[9]

22. Telocator also recommended changes to this subsection. Telocator contends that modification of either the station's coordi-

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[9] Comp Comm suggested also that the Commission assign file numbers to all Forms 489 and list them with brief descriptions in an Informational Public Notice. See discussion in paragraph 218, *infra*.

nates or authorized frequency should be accompanied by an engineering and co-channel interference study and should be subject to the same public notice requirement as the filing of a Form 401 for a radio station authorization. It also recommended deleting proposed subsection (d)(6) (addition of frequencies for mobile transmitters) in view of the proposed subsection (c)(1), discussed *supra*, which does not require additional authorization for land mobile stations.

23. We agree with Comp Comm and Telocator that a change in authorized frequency is a major modification which requires that the request be placed on public notice. Under our new procedures this will require the filing of a Form 401. Also this will require filing interference studies as required by Section 22.15. Concerning subsection (d)(4) we have found that applicants have improperly used the provision concerning corrections as a basis for circumverting the major amendment rules. We have included a proviso that if, in fact, the applicant is proposing a major station relocation, it must submit a Form 401 and interference studies. Next, we agree with Telocator that proposed subparagraph (d)(6) should be deleted because separate mobile unit authorizations are no longer required by our rules. In new Form 489, we are requesting exhibits for changes to facilities; thus, the commenters concerns in this regard are satisfied. We are also adding a new subsection (5) for minor engineering changes.

24. *General Application Requirements, Section 22.13*. We proposed some changes to this rule, the major one being state certification requirements. TDS submitted comments requesting that we clarify Section 22.13(a)(i)(i) concerning real party in interest, which was changed in Gen. Docket 80–183.[10] TDS requested that, for companies controlling the applicant, the rule should only require disclosure of persons holding at least 50% of the applicant's voting stock (including warrants or options) cumulated without regard to class. TDS contends that the additional disclosure regarding persons with interests in nonvoting stock or debt securities is not necessary and imposes regulatory burdens. TDS requests that § 22.13(a)(1)(iii) be revised in conformance with its suggestion. Telocator in reply comments rejected TDS' proposal, and suggested maintaining expanded disclosure as adopted in Docket 80–183. We will reject TDS' proposal since we recently amended the referenced sections and we are not persuaded that there is any benefit in revising them further here.

25. *State certification, Section 22.13(f)*. We proposed to revise this rule to incorporate various recent decisions interpreting our state certification requirements.[11] We also proposed to simplify the rule

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[10] 900 MHz paging stations, 89 FCC 2d 1337 (1982).

[11] Mobilfone Service, Inc., Mimeo 07273, released Feburary 23, 1981, *modified*, Mimeo 0011344, released May 26, 1981; Hazle-Tone Communications, Inc., Mimeo

by adopting one uniform standard to apply to all radio services under Part 22.

26. Telocator proposed that Section 22.13(f) require an applicant to file for state certification within 90 days after public notice of the filing of a construction permit application, and concurrently notify the FCC of filing for state certification. If notification is not on file after 90 days, the application would be dismissed as defective, or in the alternative extensions of time to complete construction should not be granted. Telocator contends that its proposal is geared toward providing an objective threshold to determine "due diligence" concerning extensions of construction permits under Section 22.43(b). Telocator also proposed that "date of license grant" be clarified in accordance with our proposed revisions of the two-step license process. It suggests that it be the date proposed Form 489 is postmarked.

27. TDS in its reply comments objected to Telocator's proposal that applicants be required to file for state certification within 90 days after public notice of the construction permit application's acceptance for filing. It asserts that this is an unnecessary and inequitable intrusion on licensee discretion.

28. We reject Telocator's proposal and we will adopt the rule as proposed. We believe the standards we are adopting are sufficiently clear to enable applicants to know that they must obtain state certification within the time periods provided by the rules and that they must act with due diligence in obtaining state approval. Determining due diligence as provided in Section 22.43(b)(2), contrary to Telocator's contention, is not unduly burdensome for the Commission. We fail to see how the public interest will be better served by requiring applicants to commence state certification proceedings within 90 days. In the past we have applied the standards being adopted in Section 22.13(f) and they have proved to be workable. Applicants uniformly have been diligent in seeking state certification. Finally, we believe that the term "date of license grant" is clear and does not require further clarification. On the other hand, we believe it is desirable for administrative reasons to create a presumption against which we can measure due diligence when we consider requests for extensions of time to complete construction predicated on delays in state certification. See our discussion of Section 22.43, *infra.*

29. *Site Availability, Section 22.15(a), 22.20(b)(5) and (7).* We proposed to eliminate the requirement that applicants demonstrate the availability of proposed sites in the applications. We proposed instead that in specifying a proposed site location on the application, the applicant implicitly represents that he has obtained reasonable

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06645 (Com. Car. Bur.), released February 10, 1981; Alfred C. Cordon, Jr., 80 FCC 2d 328 (1980), *recon. denied*, FCC 82-218, released May 19, 1982. *See* also Public Notice, Mimeo 36626, September 30, 1980.

assurance that the site is available for the proposed use. We therefore proposed to revise Section 22.15(a)(1), and delete Sections 22.20(b)(5) and (b)(7).[12] Peters suggested retaining the requirement of a written site availability showing. He asserts that in light of other proposals to eliminate detailed maintenance showings, public need surveys, and so on, this is the last safeguard against filing of fictionalized applications. Kadison agrees with the proposed elimination of the site availability showing with two provisos: (1) the applicant be required to affirmatively state it has reasonable assurance of site availability, (2) and present site availability rules remain in effect for the cellular service. Kadison states that cellular system designs are based on transmitter locations; therefore, changes would affect comparative hearings. USITA, Pagenet and Telocator agreed with the elimination of site availability showings. Telocator in reply comments objected to Peter's and Kadison's proposals. Telocator states that the filing of site availability letters with the application appears superfluous.

30. We have decided to adopt a simple certification requirement. The revised Form 401 contains an item in which the applicant certifies that it had reasonable assurance that the site proposed in its application was available at the time it prepared its application. There is a great deal of case law defining "reasonable assurance," much of it developed recently in the orders granting and designating for hearing cellular applications. Briefly, an applicant need not have a lease or an option to lease, but it must determine that there is space available on an existing building or tower, or, if a new structure is to be built, that the property is available for such use and that it is reasonable to anticipate that it may use this space. This certification will apply to all applications filed after the effective date of this order, including cellular applications. As we stated in the NPRM, if a party demonstrates, contrary to the certification made by the applicant, that a substantial question exists as to whether the specified site was available,[13] we shall carefully examine the facts before issuing a construction permit. Any false certification will be considered a misrepresentation to the Commission and will precipitate remedial action.

31. We are adopting the certification requirement because a great deal depends on the accuracy of the applicant's technical submission, which is based mainly on the accuracy of the geographical coordinates for the transmitter. Our experience processing both

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[12] Sections 22.20(b)(5) and (b)(7) provide that lack of a site availability showing makes the application defective.

[13] Because of the time lag between the filing and granting of an application, it is not uncommon for an applicant to lose its original site. For that reason, the certification is tied to the time of filing the application, not to the time it is reached for processing. *See also* discussion of Sections 22.9, 22.23, and 22.43, *infra.*

low band and 900 MHz paging applications and cellular applications showed that a number of applicants did not attempt conscientiously to obtain reasonable assurance. Without reasonable assurance, any measurement of reliable service areas and potential harmful inteference is suspect. Furthermore, in conventional paging and two-way services, the precise transmitter locations determine whether or not applications are mutually exclusive. We believe that the more stringent requirement of certification (as opposed to the looser requirement proposed) will prompt applicants to take the site availability requirement more seriously and will, thereby, help us avoid processing delays and later interference problems. At the same time, we are not increasing the burden on applicants because we do not require the preparation or submission of any new documentation unless the certification is challenged and shown to be questionable by a petitioner. Overall, we find this approach to be the best compromise between the need for accuracy and reliability in applications and our desire to reduce burdens on applicants and our staff. We are therefore adopting Section 22.15(a) as revised and eliminating subsections 22.20(b)(5) and (b)(7).

32. *Interference studies, Section 22.15(b).* In the NPRM we proposed to revise this rule which requires applicants to file interference studies to demonstrate that the proposed facilities will not cause co-channel inteference. In addition, we added language requiring that these studies be conducted within 60 days before the application filing date, to prevent the submission of outdated information. We also proposed to relax the requirement that applicants file their supporting data and calculations as part of the inteference studies. Instead we proposed that applicants not file the calculations but simply retain them and furnish them upon request. This approach reduces the size of the application and filing costs. We also proposed to add a listing stating the information to be contained in the interference studies.

33. Peters suggested that the proposed rule be clarified by making it inapplicable to the cellular service and adding a paragraph applicable to 900 MHz paging facilities, requiring applicants to identify any existing or proposed 900 MHz paging stations within 70 miles. For each nonaffiliated station, Peters wants applicants to state whether they have a time-sharing or similar agreement. Comp Comm suggested that the interference studies include a service and Carey Interference Contour Map[14] showing the proposed facility in relation to all co-channel facilities that must be protected. Comp Comm states that the showings proposed in the rule are incomplete, in that they do not provide for protection in directions other than

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[14] A Carey Interference Contour Map is a map in accordance with FCC Report R-6406 which shows the interference relationship of the proposed station to all co-channel stations within the mileage separation specified in Section 22.15(b).

along the interstation radial. A highly directionalized facility can show inteference free operation along the interstation direction, but cause inteference along another nearby azimuth.

34. Hill suggested that the section provide for a 68-mile standard for paging operations with an alternate showing based on a minimum mileage chart established specifically for paging (applicable to 150 MHz and 35 – 43 MHz spectrum). Hill states that establishing a minimum mileage separation table for paging would provide applicants with the same standard of proof which two-way applicants must make, whereas paging applicants currently bear a greater burden. He further states that applying Section 22.505 and the Section 22.503(a) table does not exempt co-channel paging stations from the Carey study, largely because minimum separations are based on protection to the 37 dBu for 150 MHz operators, whereas paging is protected only to the 43 dBu contour. He states that Sections 22.15(b) and 22.503(a) can be further refined by adding minimum distances specifically for paging and eliminating the chart for the 35–45 MHz band. He states that at 500 ft./ 500 watts (maximum facilities), the minimum separation on either the 150 or 35–43 MHz channel, to be interference free, is 68 miles. Hill also asserts that requiring a study for paging stations within 75 miles is unnecessary and increases costs, especially where there is a multisite existing facility located barely within the 75 mile proposed radius.

35. Telocator recommends that the rules require applicants to provide the underlying data describing co-channel facilities and that the data be attached to the interference study.[15] It also recommends that applicants be permitted to supply the Commission with a letter of "Consultation and Consent" executed by the co-channel licensee, in lieu of an interference study and supporting data. Telocator asserts that this encourages private solution of potential problems and provides a means for recognizing unique circumstances like a natural physical barrier which otherwise would not be factored into an interference study.

36. USITA recommends clarifying the "within 60 days language" for when interference studies must be prepared, to "within 60 days before" or "within 60 days prior". MCI in reply comments supports Hill, stating that the current paging interference studies are inappropriate for the 35–43 and 150 MHz paging operations, and that they are excessively burdensome.

37. As to Peters' comments concerning this rule, subsection (b) is clear that it does not apply to the cellular service. The mileage separation criteria for 900 MHz paging applications are established in Sections 22.525(c) and 22.503; therefore, Section 22.15 does not

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[15] Telocator also suggested that a uniform exhibit designation should be specified in the application form for this purpose.

require a specific paragraph for 900 MHz applications. We agree with Hill and MCI that the minimum mileage separation which requires an interference study for paging stations needs to be corrected; therefore, we have amended Section 22.503 by adding a new subsection (b) to include a table specifically depicting minimum mileage separation for one-way stations in the 35–162 MHz band. In Section 22.15(b)(1)(ii) we reference Sections 22.502 and 22.503. As we proposed we will not require that the supporting data and calculations be furnished with the application but rather upon request; we believe the rule already requires sufficient information. We will not adopt Comp Comm's suggestion that applicants file a Carey interference contour map. This would be an additional burden for applicants which would not necessarily facilitate application processing. As to Telocator's recommendation that applicants be allowed to supply a letter of "consultation and consent" executed by the co-channel licensee, in lieu of interference studies, we will not formally adopt it. Our practice in the past has been to accept these letters in addition to, but not in place of the interference studies. We will continue this practice and applicants may submit these letters but they will also have to submit interference studies. The interference studies are needed in these situations to enable us to ascertain the extent of the interference and to determine whether the proposal is in the public interest. We also will accept USITA's recommendation and correct the rule to state that the studies shall be conducted within 60 days prior to the filing of the application.

38. *Antenna Structures, Section 22.15(c).* In the NPRM we proposed to combine two present paragraphs in this rule, (c) and (d), into a new (c) dealing with antenna structures. We proposed to eliminate the requirement that the sketch show all antennas in the structure. The reasons for this requirement are no longer valid and the requirement is burdensome. We also proposed to revise the paragraph dealing with FAA notification to restate it in plain language. Also, our proposal entailed conforming this rule to a proposed revised Section 22.121 (Replacement of Equipment), so that the filing requirements apply only to increases in antenna height and to new antennas not already on file with the Commission.

39. Peters suggested replacing our current procedure of requiring Form 714 (FAA notification) with requesting the FAA study of the structure or the date notification was made to FAA, along with other identifying information, if the applicant has not received the FAA's study. Comp Comm disagreed with the requirement that the FAA study be submitted with the application. It proposes we retain the present Form 714 procedure, and suggests cross-referencing where a previous FAA study number has been given on structures previously approved by FAA.

40. We will adopt the rule as proposed. The new Form 401 will include the information required in Form 714; therefore, we are

eliminating this Form. In addition we have always required the FAA determination if it is available. We will retain this requirement. By determination we mean whether the structure has received FAA approval. The word "study" in the proposed rule created confusion; therefore, we are using the more precise term, "determination."

41. *Other pending applications, Section 22.15(i)(2).* We proposed to revise Section 22.15(i)(2) to provide that applicants would identify any other pending or concurrently filed applications within 25 miles of the proposed station, instead of in the same general area as in the present rule. The old rule was ambiguous and gave an incomplete picture of the situation in an applicant's proposed service area. This rule makes possible for the staff in processing applications to be fully aware of other pending or licensed facilities of the applicant. On further review we are adopting a 40 mile radius standard in order to make this section consistent with our current policies. The proposed 25 miles was an imprecise standard. *See 900 MHz proceeding*, 89 FCC 2d 1337 (1982) *recon.* (Part 1), FCC 82–503, released November 16, 1982, *recon.* (Part 2), FCC 83–146, released May 4, 1983. Consistent with the 900 MHz proceeding and the 50% overlap rule for two way stations at maximum height and power a 40 mile radius standard is more accurate. If there are two stations in the same vicinity both of which have height-power waivers there will be greater than a 50% overlap between them at a separation under 40 miles. Thus, the 40 mile standard assures that all possible situations are addressed. Since the old rule only asked for "in the same general area" the rule we are adopting is a refinement. It will also create less confusion for applicants because the same standard will apply to everyone instead of diverse standards for paging and two-way. This standard will also save significant processing hours for the staff.

42. *Radiation pattern, Section 22.15(i)(4).* We did not propose to amend this section which requires a polar diagram of the radiation pattern of a transmitter. Vega suggested adding a phrase to this section "for other than omnidirectional antennas", i.e., where the power gain, expressed in dB's, is equal at all points. This, Vega asserts, would alleviate the burden of including omnidirectional patterns. There is, from a practical perspective, no need for a polar diagram when an omnidirectional antenna is mounted on the top of the supporting structure. However, omnidirectional antennas are frequently side-mounted with a resultant change in the radiation pattern. Accordingly, we will accept, but modify, Vega's proposal to exclude from Section 22.15(j)(4) omni-directional antennas mounted at the top of the supporting structure. See also the discussion of Section 22.108.

43. *Topographic Maps, Section 22.15(j)(8).* We proposed to elimi-

nate the requirement that applicants submit topographic maps as part of the application.[16] Instead, applicants will prepare and retain these maps as part of their business records. We also proposed to require applicants to make these maps available to the staff upon request and make them available to members of the public at a reasonable reproduction cost. We believed this would substantially reduce the volume of paperwork currently processed and still permit the staff to examine topographic maps in those unusual situations where it is necessary. In addition, we clarified that the topographic maps should include lines of latitude and longitude as well as a scale. The topographic maps are used in computation of average terrain elevations.

44. Peters suggested that we eliminate preparation of these maps when average elevations are determined by computer. He states that the trend among engineers is to use a computerized terrain data base, and obtain and plot average terrain points. He states that this eliminates human error and is less costly.

45. Comp Comm suggested that the requirement for submitting and retaining topographic maps that show the location of radials used in determining average terrain elevation information be eliminated. Comp Comm asserts that the maps serve little purpose, submissions if in full size, are voluminous and costly to reproduce, and reduced submissions are unreadable. Modern computer digitizing techniques provide other ways of obtaining this information without drawing the actual location of each radial on topographic maps. Comp Comm also suggested that the requirement for preparing and submitting an unreduced part of a topographic Quadrangle Map showing the exact location should be retained. It states that these maps are inexpensive to prepare, are normally prepared for submission to the FAA, and aid greatly in assessing the exact location of sites. As a result, coordinate discrepancies can be resoved easily. Comp Comm recommends that these requirements be clarified to apply to all Form 401 applications, including rural radio transmitter sites, but not receiver sites.

46. Hill recommended that the Commission retain the provision that the applicant provide a map showing the precise location of the site because such maps do not involve a major cost to applicants and they sometimes reveal that prior coordinates of towers are in error by 1;2 mile or more. These errors, it is argued, are more likely to be brought to the Commission's attention if a map is required.

47. Telocator accedes to eliminating the submission of topographic maps provided that this does not change the requirement that the maps in fact be prepared and provided promptly to

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[16] These maps are not to be confused with the U.S. Geological Survey maps on a scale of 1:250,000 that are required to be submitted with cellular and 900 MHz paging applications.

interested parties on request. Should problems develop, Telocator asserts, the Commission should reinstitute filing requirements. USITA also agrees with the proposal.

48. Fletcher in reply comments suggests that we specifically allow the use of computerized terrain data and computer methodology for determining the height above average terrain as an alternative to manual methods using topographic maps. Fletcher would also eliminate the requirement for preparation of profile graphs, average terrain elevations and so on, for 900 MHz paging facilities.[17] Fletcher states that computerization is quicker and significantly less costly.

49. MCI in reply comments supports Hill's and Comp Comm's suggestions of retaining submission of maps showing the exact location of proposed station transmitter sites in order to resolve coordination discrepancies quickly. MCI concurs with the rest of the proposed rule, i.e., that the maps be maintained by applicants and be made available at the Commission's request. MCI states that the proposed rule invites disputes inasmuch as it provides that maps be promptly furnished to members of the public at reasonable reproduction costs. It suggests an alternative, that the rule direct members of the public to request the maps from the Commission, which in turn would formally request filing by an applicant within a reasonable period of time (as a minor amendment). The public then would follow normal Commission procedure for obtaining the maps. MCI suggested that this apply only to pending applications to avoid burdens on storage and retrieval of this information.

50. We have decided to allow the use of computerized terrain data for the computation of average terrain elevations. We have been persuaded that this is in the public interest in accordance with our desire to update our rules, to keep them current with technological advances, to eliminate human error and to reduce costs for applicants. In order to provide consistency in filings we will require the use of the National Geophysical and Solar Terrestrial Data Center, 30 second point elevation file. This data must be processed for intermediate points along each radial employing linear interpolation techniques. The height above mean sea level of each antenna site must be obtained using appropriate topographic maps. In addition, we have added language to Section 22.15(j)(8) providing that the topographic maps and profile graphs need not be prepared when using computerized techniques. *See* Section 22.115(c)(2), which allows computation of average terrain elevation to be computer-generated. We reject Comp Comm's, MCI's and Hill's suggestion to require site maps, as unduly burdensome on the applicants. This

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[17] This was already done in the 900 MHz proceeding, General Docket 80-183, 89 FCC 2d 1337 (1982), Memorandum Opinion and Order on Reconsideration (Part 2), FCC 83-183, released May 4, 1983.

filing is not necessary in light of our decision not to require the filing of the topographic map unless requested by the staff. In cases of coordinate discrepancies, the staff will request the maps if necessary. We also reject MCI's suggestion that we require applicants to submit the maps to the Commission with the Commission making them available to the public. This procedure would be unduly burdensome for the Commission. We disagree with MCI that the rule invites disputes and instead believe that the public will reasonably comply with this rule.[18] It is intended to assist those who may have standing to object to an application on the ground of potential electromagnetic interference. The applicants are under no obligation to provide the maps to any other persons.

51. *Waivers, Section 22.19.* Since in this comprehensive revision of the rules we intend to eliminate, clarify and update rule sections which have previously been the subject of waiver requests, we proposed to adopt a more restrictive approach to waivers. Specifically, we proposed to require that all waiver requests be fully supported and that applications with unsupported waiver requests be dismissed as defective unless the applicant also provided an alternative proposal complying with the rules.

52. Kadison objects to this rule as being too restrictive; it suggests that a waiver be justified where an applicant demonstrates good cause, regardless of "unique circumstances". Kadison asserts that a restrictive waiver rule will not permit systems to evolve with new technology or ideas. Further, Kadison believes that waiver requests should not be required to be accompanied by an alternative showing because it may be unfair, especially where the information requested is proprietary or its production is burdensome. According to Kadison, the Commission should allow applicants to either amend or dismiss the application if the waiver request is rejected. Vega also objected on similar grounds. Telocator supports adoption of the rule and recommended clarification of subpart (a).

53. We will adopt the rule as proposed with one modification. As we stated in the NPRM we expect that under our revised rules applicants will only request waivers in extraordinary circumstances. We believe our rule will eliminate excessive administrative burdens by limiting frivolous waiver requests, of which there are many. Requiring applicants to submit alternative proposals which comply with the rules is not unduly burdensome. We also disagree with Kadison that this is too restrictive and will not permit systems to evolve with new technology or ideas. We have a rule for developmental authorizations which provides for new system development. We

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[18] We clarified section 22.15(j)(8) by providing that the profile graphs prepared according to Section 22.115(b) need not be filed, and we clearly indicated the scale of the topographic maps.

agree with Telocator and have clarified subpart (a) to include language regarding the showing for waiver requests.

54. *Defective applications, Section 22.20.* Although we only proposed miscellaneous revisions to this section e.g., to correct various errors in subpart (b) and to eliminate language with regard to site availability commenters suggested additional changes to this section.

55. FCBA suggested that we clarify Section 22.20(a)(2) which provides that an application will be returned as defective if it does not substantially comply with the Commission's rules, regulations, and requirements. FCBA states that this section is ambiguous in reference to when an application is entitled to comparative consideration. FCBA asserts that the implication in Section 22.20(a)(2) is that, if an application does substantially comply with the Commission's rules, it is acceptable for filing. Telocator in reply comments rebuts FCBA's concern. It states that under *Allen C. Moore*, 86 FCC 2d 787 (1981), the Commission set forth an objective test for determining whether an application is entitled to comparative hearing: whether the application was received in a form acceptable for filing prior to the cut-off date. Therefore, Telocator maintains there is no need for clarification.

56. We agree with FCBA that section 22.20(a)(2) requires clarification and we will amend it accordingly to make clear that applications that are unacceptable for filing will not be entitled to comparative consideration. In effect, we are codifying *Allen C. Moore*. This change also reflects Commission policy that "substantially complete" applications which are defective are not entitled to comparative consideration in the common carrier mobile services.[19]

57. *Amendments of Applications, Section 22.23.* We proposed to amend our rule dealing with amendments to applications in order to clarify the rule, avoid extensive litigation which our present rules have created, expedite application processing and accelerate service to the public. We now discuss each of our proposals.

58. *Amendments As of Right, Section 22.23(a).* We proposed to permit amendments only within 90 days from the application filing date. Beyond this point the applicant must withdraw the application and file the "amended" application anew. We also proposed, in order to expedite the processing of applications, that once a petition to deny has been filed against an application, no amendment to that application would be permitted unless the amendment is filed to

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[19] Kadison agreed with retaining Section 22.20(b)(2) which refers to an application being defective because the filing fee is insufficient. However, as we indicated in the NPRM the Commission has suspended the collection of filing fees. This does not preclude the Commission or Congress from establishing a filing fee schedule in the future. Thus, we are not deleting this section at the present time because the Commission has not announced the permanent discontinuance of filing fee schedules.

meet all the objections of petitioners, such that any petition(s) may be dismissed.

59. This proposed rule was inadvertently adopted in the *Second Report and Order* in the Lottery Proceeding, FCC 83–114, 48 Fed. Reg. 27182 (June 13, 1983).[20] The effective date of this rule was stayed by Order, FCC 83–378, released August 9, 1983. We intended to examine changes to this rule in this proceeding. Extensive comments were filed offering various alternatives to our proposal.

60. Peters asserts that it is too restrictive and suggests allowing an amendment as of right provided that: (1) it is filed within 90 days of the latest date of public notice of the application (reflecting the necessity for issuing notice of a major amendment); (2) the amendment is required by Section 1.65 of the Commission's rules; (3) the amendment responds to one or more objections raised by a petition to deny; (4) the amendment resolves frequency conflicts without creating new or increased frequency conflicts; or (5) the amendment responds to a Commission request. Peters also suggests that the Commission provide that it "may return a tendered amendment as defective if the amendment is filed in violation of this section or if acceptance of the amendment would result in the amended application being returned as defective pursuant to § 22.20(a). Return of an amendment will not affect the status or content of the application as previously filed or amended.

61. Many of the comments objected to the proposal not to allow amendments after a petition to deny had been filed unless it responds to all the objections in the petition. Kadison argues that this will encourage petitions to deny as a means of interfering with the applicant's right to amend. TDS asserts that this proposal will encourage numerous and lengthy pleadings, and that this section will encourage carriers financially capable of litigating for long periods to force applicants with limited resources to agree to settlements on terms favorable to the protester. FCBA opposed the section on similar grounds.

62. Kadison agrees with allowing amendments within 90 days of the original filing date in compliance with Section 22.29 (settlement agreements) as applicable. It also suggests that amendments be permitted after 90 days if good cause is shown, compliance with Section 1.65 always being considered good cause. AT&T also agrees with the 90 day period, stating that existing policies have led to regulatory abuse and delays, and recommends that the 90 days begin at the time the application appears on public notice. FCBA in its comments also requests that the section be clarified to indicate whether Section 1.65 amendments will be permitted to be filed after

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[20] A Petition for Partial Reconsideration of this rule has been filed in the Lottery Rulemaking proceeding by Kadison. We will grant the Petition to the extent indicated in paragraph 64, *infra*.

the 90 day period or after a petition to deny has been filed. It asked for clarification of Section 22.23(a) in light of the Section 22.23(c) major amendment rule, regarding whether all amendments are precluded after 90 days. Telocator in its comments assumes that the 90 day limit does not preclude the Commission from entertaining motions for leave to amend beyond the 90 days. FCBA also requested clarification of this aspect. Hill opposes the 90 days rule, stating it will create more work and will result in applications for modifications of construction permits being filed instead of amendments. Hill also criticizes the failure to provide for amendment under Section 1.65 of the rules. As to amendments after petitions to deny have been filed, Hill states that this should not affect an applicant's right to amend within the same time period established for other applicants with which it is mutually exclusive. MCI in reply comments objects to the proposed rule, agreeing with Kadison's and Hill's comments.

63. Our 90-day rule was designed to expedite application processing. Likewise the other rule revisions are intended to streamline our procedures. However, after further consideration we have decided to modify subsection (a). We have been persuaded that the rule would not promote our objectives but instead would create additional burdens for applicants and the staff. Upon further analysis we believe the rule we had in the past is more efficient than the 90-day rule. Therefore, we are adopting a rule which will permit amendments as of right at any time prior to designation for hearing or before the application is placed on public notice for a random selection process.

64. We will also modify subsection (a) (2) which provides that after petitions to deny have been filed, amendments would be permitted if they responded to the objections raised in the petitions so that the petitions may be dismissed. We have been persuaded by the comments that our proposal goes too far and would probably precipitate additional pleadings and concomitant delays. We have provided that amendments which resolve interference conflicts or amendments under Section 22.29 may be filed at any time.[21] We believe the rule we are adopting is more in line with our objectives without being unduly burdensome to the public.

65. We do not agree with the comments that we should include the filing requirements of Section 1.65 under this subsection. Section 22.13(a)(5) already provides that applicants are required to maintain their applications substantially accurate and complete. The purpose of Section 1.65 is merely to ensure that applicants inform the Commission of any information in their applications which is

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[21] However, any such amendments filed after designation for hearing must be approved by the Administrative Law Judge in accordance with § 22.23(b); any such amendments filed after the application is placed on public notice for a random selection process must be filed in accordance with that public notice's requirements for the filing of such amendments.

inaccurate. Thus, acceptance of an amendment for purposes of Section 1.65 may involve no determination as to the effect to be given it for other purposes.[22]

66. *Major Amendments, Section 22.23(c).* We proposed to take a more liberal approach in classifying amendments to applications, deleting some of the categories of major amendments in the old rule. Instead we proposed that all amendments be considered minor (not subject to public notice requirement and cut-off rule) except for the categories we listed. We intended to clarify this rule and to streamline processing of applications by reducing the number of applications that unnecessarily appear on public notice.

67. Peters agreed with the proposed rule with the proviso that the requirement of submitting an exhibit showing both the original and proposed service contours apply only to situations involving Section 22.23(c)(2) (amendments to base station facilities) and that (c)(1) (change in technical proposal) and (2) not apply to cellular applications. Peters also states that (c)(2) is ambiguous as to whether it refers to greater or lesser of 10% or one mile. Kadison suggested retaining current (c)(4) which governs amendments converting the proposal into a major environmental action under Section 1.1305. Kadison states this type of amendment should be considered major because major environmental actions as provided in the National Environmental Policy Act of 1969 should be placed on public notice and be open to protest. Kadison also disagreed with the proposed language concerning changes in ownership or control, arguing that simplification may change the meaning of the section or make it ambiguous because "substantial" is undefined. Kadison suggests following "applicant" with "such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application."

68. In its comments TDS disagrees with the proposal for subsection (c)(2) when overlapping base stations under common ownership are involved. It suggests creating an exception to read "where the enlargement is wholly encompassed by the reliable service area of base station facilities under common ownership." Vega had a similar proposal, i.e, that the rule should treat modifications as minor for wide-area systems where there is no change to the existing licensed service area or proposed service area. The contours of the wide-area system much like the cellular geographic service area, would be the composite outer service area contour. The existing licensed service area and proposed service area changes would be examined for that portion of the contour that makes up the overall area, under the one mile/10% rule. Proposed

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[22] Cellular Systems, Memorandum Opinion and Order, FCC 83-161, released April 22, 1983. In this order we recently indicated that Section 1.65 is not intended for major amendments and should not be used to circumvent our rules.

changes then, must not encompass any new territory, above and beyond the one mile/10% rule, that is not already served by at least one other site. Vega states this would allow greater system flexibility.

69. Comp Comm suggested clarifying (c)(2) by adding after 1 mile or 10%, the phrase "whichever value is greater",[23] and modifying Section 22.23(c) by adding that the exhibit showing both the original service contour and the proposed service contour should be submitted on 1:250,000 USGS maps without reduction.

70. Hill recommends that proposed (c)(2) give credit to the area lost in a modification of a proposed service area complying with the 10%/1 mile rule. He states that in relocating a site, an applicant usually loses substantial service in areas to avoid the "major amendment" status. Then, when the area lost is critical, the applicant will often seek a modification to gain it back. Hill suggested that the rule have an alternative to the 10%/1 mile rule: that the modified proposal would be a minor amendment if the change in service area amounts to no more than a 10% net gain in service area (gain less loss area). He states that this would eliminate emphasis on gain area to the exclusion of the loss area. He also recommended that the rule recognize that it can be used to determine whether an application for modification of an existing facility can be processed on an expedited basis. As long as an application for modification has been filed and an appropriate showing submitted establishing that the nature of the application is "minor," the licensee should be allowed to proceed with the change. This would help eliminate the number of STA's filed and is analogous to the proposal to allow fill-in transmitters without formal filing requirements. MCI in reply comments agrees with Hill's comments concerning the credit for area lost but suggests that the standard be changed to 20% gain in any one of eight radial directions, eliminating the mileage criteria.

71. Telocator agreed with the proposed rule with one caveat. Telocator suggests that any change in station location should be classified as a major amendment for the limited purpose of affording co-channel licensees the opportunity to object to the amendment on interference grounds. It asserts that this will enable co-channel licensees independently to verify the applicant's calculations with respect to whether the amendment will enlarge the reliable service area by more than 10% or extend a radial of the reliable service area by more than one mile. Telocator argues that this will help insure the accuracy of independently maintained data bases which will be relied upon in the coordination of later frequency requests. It asserts that the application should not be considered newly filed unless the amendment expands the reliable service area by more than 10% or

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[23] MCI in reply comments suggested the same.

more than 1 mile. MCI agrees with Telocator's proposal but notes that interference standards should continue to be objective and amendments should be reviewed by the staff according to such standards.[24]

72. Telocator in reply comments agrees with Vega's and TDS' proposals for commonly controlled stations. It agrees with adding the language proposed by TDS, provided the Commission also adopts Telocator's proposal to classify amendments for change in the location of the station as major.[25]

73. TDS also suggested that the rule be clarified to state that an amendment filed by the first filed mutually exclusive applicant will not be considered a major amendment where the amendment is designed to make its reliable service area contour equivalent to that proposed by the competing applicant. Telocator objects to TDS' recommendation.

74. We are adopting the rule as proposed with minor modifications. In accordance with our decision not to require Carey interference contour maps we will not require that amendments to applications be accompanied with an exhibit showing the original service contour and the proposed service contour. This would be an additional burden for applicants. As required in the past we still require that all major amendments must make the interference free showing as specified in Section 22.15(b). We also reject Kadison's proposal that we include in this rule amendments which constitute major environmental actions pursuant to Section 1.1305 of the rules. Amendments which involve major environmental actions are listed on public notice under Section 22.27(a)(4) of the rules merely for the purpose of filing comment based on environmental impact. See also Section 1.1313 of the Rules. There is no reason to consider them major amendments for the purpose of treating the application as a newly filed application.

75. We will adopt TDS' and Vega's proposal concerning stations under common ownership and we will add a sentence at the end of subsection (c)(2) providing that it will not apply if the extension is into a service area presently authorized to the applicant and on the same frequency. We will also clarify this section to state that amendments which enlarge the reliable service area of base station facilities by more than one mile along any of the eight radials are considered major amendments. This criterion is less ambiguous than

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[24] Offshore suggested that the language in Section 22.23(c)(1) "change in technical proposal such as but no necessarily limited to" be changed from "such as (but no necessarily limited to)" to "defined" as." We do not find this to be an improvement on the current language.

[25] MCI in its reply comments also suggests permitting amendments to reduce the size of the Cellular Geographic Service Area. The Commission has already granted the relief sought by MCI in the Cellular Rulemaking, CC Docket No. 79–318. Memorandum Opinion and Order, FCC 83–161, released April 22, 1983.

the proposed 10% or 1 mile rule and it establishes the same criteria for everyone regardless of the size of the service area. We are also rejecting Hill's and MCI recommendation that we consider the overall net gain in the service area (i.e., if an applicant decreases by one mile along the 315 radial and increases by 2 miles along the 45 radial, this should not be considered a major amendment). We will adopt the rule that any increases of more than a mile will be considered major. Hill's and MCI's suggestion has the potential for creating more interference for co-channel systems than the standard we are adopting.

76. As to Hill's recommendation that "minor" modifications to existing stations should be allowed to proceed as long as the application for modification has been filed, Section 22.9 and the new Form 489 provide for this. However, a major modification requires the filing of a Form 401 for an authorization.

77. We do not agree with Telocator that any change to a station location should be classified as a major amendment. We deem changes in the reliable service area to be the more important criteria and not changes to the station location. In addition, we disagree with TDS' proposal to consider as a minor amendment changes to the reliable service area to make it equivalent to the service area proposed by a competing applicant. We consider changes to the reliable service to be major amendments and we will not factor in whether the applicant wants to change its reliable service area to make it equivalent to that of a competing applicant. The language we are adopting gives the staff the flexibility required to resolve issues that we may not be aware of at this time.

78. *Mutually Exclusive Applications, Section 22.23(d).* The major amendment rule has two purposes: to require that amendments which are major under Section 309 of the Act and the rules be listed on public notice, and to establish the filing date for the application as the date on which the major amendment was filed. This latter proviso is crucial because of the cut-off rule, which provides that an application for the same frequency will be entitled to comparative consideration with an earlier-filed application if the later application is filed within 60 days of public notice that the first application was filed. The ambiguity of our old rule has created problems and delayed processing of application when a mutually exclusive applicant files a second application, and the staff could not determine whether it was filed with the purpose of amending the earlier filed application. We therefore proposed to focus on two factors; (a) the cut-off rule and (b) expedited processing of mutually exclusive applications. In the NPRM we stated that we would process the mutually exclusive applicant's later filed application which is not intended to amend the first, separately from the first. We also proposed that no major amendments of a mutually exclusive application would be permitted except to withdraw from the

mutually exclusive situation (i.e., amendments which resolve frequency conflicts). We further stated that this policy would apply regardless of whether the 60 day period had passed. Finally, we also proposed in order to avoid delay in mutually exclusive situations, that an applicant which is mutually exclusive with an earlier applicant shall file a separate Form 401 for the frequencies which are not mutually exclusive with the first applicant. The last proposal would amend Section 22.31(e).

79. Peters disagrees with this rule, stating that applicants should have a right to amend regardless of whether the application is mutually exclusive, assuming the major amendment is filed within the 60 day cut-of period for the amended application. Peters also states that the rule should specify what treatment is going to be accorded to an application in a situation where the applicant files a major amendment either without knowledge or in spite of a pending mutually exclusive application. Kadison suggested that the rule allow amendments that fall in the categories described in proposed Section 22.23(h), which is now Section 22.31(e), the exceptions to the major amendment classification. Kadison also suggests that all major amendments be allowed prior to the end of the cut-off period. The reasoning is that during this time period a newly filed application would not be cut-off in any event.

80. As we stated in the NPRM our purpose is to expedite resolution of mutually exclusive situations. However, after reviewing the comments we have concluded that the proposed rule would not result in expedited processing of mutually exclusive situations and would probably result in increased administrative burdens. Therefore, we will not adopt this proposal.

81. *Exceptions to major amendments classifications, Section 22.23(h).* We proposed to revise and relocate our present rule section 22.31(e). We proposed to revise subsection (2) to clarify that this exception to the major amendment classification only applies to amendments resolving frequency conflicts with other pending applications. The language in the old rule was misleading inasmuch as it referred to "authorized stations". We eliminated the exception dealing with change of equipment in accordance with our proposal to permit licensees to replace equipment without prior authorization. We also proposed to add a new exception where the applicant proposes only a change in a control or repeater frequency, since this is not such a substantial change in the original application as to require that it be considered as newly filed.

82. Telocator disagrees with the language in (h)(6) which provides an exception when the amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing. Telocator asserts that this provision requires subjective *ad hoc* determination of "demonstrably necessitated by events . .

. forseen at the time of filing." Telocator believes that the Commission should limit its role to determining objectively whether the amendment would create new or increased frequency conflicts.

83. We have made a minor modification to this rule adopting it as 22.23(g). We are not persuaded by Telocator's suggestion. The language in (g)(6) is the language we have in the current rules. That language has not created any problems either for the staff or for the applicants. We believe the section is in the public interest and we will therefore keep it in our rules.

84. *Public Notice, Section 22.27.* We proposed to amend subsection (a)(3) to provide that public notices released for informational purposes only do not create protest rights. Kadison and Telocator filed comments on this proposal. TDS filed reply comments. Kadison disagreed with the proposal because it may engender litigation as to which public notices create rights and which do not. It proposes that the rule be retained with its current wording. Telocator agrees with the proposal and suggests adding that the filing of proposed Form 489 (Notification of Status of Construction of Facilities) and minor amendments to applications are deemed to be of public significance. It asserts that the routine listing of such actions on public notice enables the industry to police compliance with construction requirements and maintain accurate data bases. TDS agrees that the filings of Form 489 should be listed on public notice.

85. We will adopt the rule as proposed. We see some merit to Telocator's proposal but we will not include it in the rule because of the heavy staff burden associated with it. The rule we are adopting permits our listing on public notice applications which we deem of public significance. We think it is not necessary to add Form 489 or minor amendments to the rule. We disagree with Kadison that the rule will engender litigation. As we stated in the NPRM we proposed this revision because our old rule has created confusion, and members of the public have believed that informational public notice entitled them to 30 days' notice and the right to file protests. We believe our rule will alleviate an unnecessary staff burden without compromising the rights of other applicants and licensees and without adding to public confusion. *See* also discussion in paragraphs 216 *infra*, *et. seq*.

86. *Ownership changes and agreements to amend or dismiss applications or pleadings, Section 22.29.* We proposed to eliminate the prior approval requirement, proposing instead that applicants notify the Commission of any relevant settlement agreements at the time they make ownership changes, dismiss pleadings or amend or dismiss applications.[26] Peters, Kadison, Comp Comm, Telocator, and Pagenet filed comments. Telocator and AT&T filed reply comments.

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[26] The present rule establishes standards by which the Commission reviews settlement agreements among parties to contested applications. In requiring

87. Peters states that the proposed rule is different from the current standards being used for cellular applications and that the rule does not state whether it applies to partial or complete settlement; Peters suggests that it be applicable to both.[27] Kadison disagrees with the proposed rule, stating among other things, that not having a limit on buy-outs for cellular applications will encourage the filing of more applications because applicants will know a profit can be made. Kadison suggests that buy-outs be limited to reimbursement of costs and that itemization be required for services like cellular and network paging for which the application costs are high. Comp Comm suggested further revising the rule to include requiring the filing of full details in all settlements involving frequency and time sharing, coordinated operation, and/or acceptance of interference. These agreements would be placed on an informational public notice to permit proper design of future adjacent systems and preparation of correct interference studies. Telocator and Pagenet support the proposed rule. Pagenet states that the proposal is a reasonable means to encourage settlements and an effort to return decision making to the market place. AT&T disagrees with the elimination of the requirement of prior Commission approval. It asserts that this will have a chilling effect on settlements, contrary to the Commission's goal of decreasing the number of comparative hearings. If the Commission abandons its role, AT&T believes other federal or state agencies may undertake greater scrutiny. There would be uncertainty about the standards used by these agencies, which may be different from the public interest standard in the Commission's regulations. Ultimately, AT&T contends, this may result in longer state certification proceedings.

88. Congress recently amended Sections 311(c) and (d) of the Communications Act of 1934, liberalizing previous standards and providing that in approving agreements removing application conflicts for broadcast applicants, the Commission will examine whether the agreement is in the public interest and will ascertain that no party to the agreement filed its application for the purpose of reaching or carrying out such agreement. Communications Amendments Act of 1982, Pub. L. 97–259, Section 116. The broadcast rules now only require that the applicants submit an affidavit stating that

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prior approval of such agreements the Commission concerns have been: (1) to discourage financial incentives to file strike applications; (2) to discourage unreasonable buy-out of competitors; and (3) to discourage attempts to delay grants or unreasonably profit from the administrative process. See Domestic Public Land Mobile Radio Service, 60 FCC 2d 549 (1976).

[27] The rule we are adopting will apply to partial settlement in non cellular services as well as a total settlement in the cellular radio service. As for partial settlement agreements in the cellular radio service we have indicated the procedure to be followed by applicants in *American Radio-Telephone Service, Inc. and Post Cellular Telecommunications, Inc.*, FCC 83–179, released May 9, 1983, *modifying* CC Mimeo No. 812, released November 16, 1982.

the agreement is in the public interest and that no party to the agreement filed its application for the purpose of reaching or carrying out such agreement. *See Amendment of Section 73.3525*, FCC 83–152, released April 14, 1983.

89. Section 311 of the Act does not explicitly apply to the Public Mobile Services. Our current rule was modeled after the more restrictive old broadcast rules. We believe that the regulatory concerns embodied in our old rule are no longer relevant in the public mobile services. The critical shortage of frequencies which underlay the prior approval policy is no longer a concern. The mobile services market is a very competitive market and thus unlikely to create incentives for the type of behavior mentioned above. We also have adequate tools to deal with abuses of the regulatory process should they occur. In light of the policy embodied in the Congressional amendments to the Communications Act, and for the reasons we have indicated, we believe it is in the public interest to eliminate the prior approval requirement and adopt the rule as proposed.

90. *Informal Objections, Section 22.30(b) and (c).* We proposed to eliminate the sections providing for informal objections to applications. Kadison, Vega, AT&T, Telocator, and USITA filed comments with regard to this proposal. MCI and TDS also filed reply comments.

91. Kadison opposes the proposal and suggests both subsections be retained as written. Kadison states that often, even with due diligence, it may take longer than 30 days to ascertain a problem and file a formal pleading; moreover, facts and circumstances may arise after the 30 day period which a party should be allowed to raise. Vega also opposes the proposal and suggests limiting the informal objections to those concerned with possible co-channel interference, because of the large number of applications, it takes longer to determine if an application would be harmful to an existing licensee. Telocator objects also, stating that trying to reduce the number of frivolous pleadings should not be accomplished by sacrificing procedures designed to insure informed decision making. MCI also objected, agreeing with Kadison and Telocator.

92. AT&T agrees with the proposal. USITA also agrees provided the Commission makes clear that informal comments will still be entertained as § 1.41 filings. TDS also agrees and asks for clarification of whether parties could file objections under Sections 1.45, 1.46 and even 1.106(b)(2) for a late petition.

93. We will adopt our proposal. The commentors have not persuaded us otherwise. As we stated in the NPRM, under our present rule many applications which would be otherwise granted routinely and quickly are delayed by informal objections. Parties are encouraged by the rules to file informal objections because among other things it is easy and inexpensive to do so. The staff spends approximately the same amount of time resolving informal objections as they spend on formal objections. The consideration given to

these objections is often not materially different from the consideration given to formal objections. Consequently, a different filing requirement is unwarranted. We believe it is not unreasonable nor unduly burdensome to require that the objection be presented with the formality required by Part I of the rules.[28] Interested persons who cannot meet the 30 day deadline may request extensions of time under Section 1.46, or they may file a properly supported motion to accept late filed pleadings. Consistent with Commission policy the staff will consider all properly supported motions.

94. *Petitions to Deny Major Amendment, Section 22.30(d).* We proposed to revise this rule to provide that petitions to deny a major amendment may only raise matters directly related to the amendment and not the underlying application, which has already appeared on public notice. Our current rule allows a petition to deny a major amendment to raise any public interest considerations, even if unrelated to the nature of the amendment and even if petitioner did not raise these matters when the original application was filed.

95. USITA and AT&T support the proposal. AT&T states that it will discourage duplicative challenges and help limit the time that an amended application may be delayed by a petition. Kadison opposes the adoption of this section. Kadison states that often a party reviews an application for the purpose of filing a petition to deny only after it receives notice of a major amendment, and that it may have had no interest or standing to oppose an application until the amendment was filed. Thus, the amendment signals the opportunity for a party's initial petition and the party should be able to raise any issue it considers legitimate.

96. We will adopt the rule as proposed, with minor modifications. We will add a provision that the rule will not apply to petitioners who gain standing because of the major amendment. We believe our rule expedites application processing and preserves due process because an interested party has an adequate opportunity to comment on the information contained in the underlying application and on the amendment.

97. *Additional frequencies, Section 22.31(e).* We proposed to add a new subsection (e) to this rule providing that, when an applicant requests a frequency which is mutually exclusive with another application, he cannot in the same application request additional frequencies which are not mutually exclusive with the first application. The additional frequencies must be applied for in a separate application. *See* discussion of Section 22.23(c). Kadison, and Telocator filed comments; MCI filed reply comments.

98. Kadison agrees with the proposal provided that the rule allows applicants to sever applications into two or more without

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[28] Our proposal does not affect Section 1.41 of the rules (informal requests for Commission action).

penalty. It states that where the application creating potential conflict has not yet been placed on public notice, or if it is listed on public notice simultaneously, an applicant may inadvertently combine frequency requests.

99. Telocator states that the rule seems to imply that the second-filed mutually exclusive application that also requests non-mutually exclusive frequencies could be dismissed. It states that this result would be too harsh and that the proposed rule will invite litigation as to whether and when an applicant should be aware of the mutual exclusivity. It suggests changing the word "shall" in the first sentence to "should". Telocator recommends that the rule afford mutually exclusive applicants (including the first filer) an opportunity to amend applications, *nunc pro tunc* (as of its original filing date), for uncontested frequencies on a second Form 401. Telocator also recommends that the staff sever the applications on its own motion, granting them to the extent they are not mutually exclusive, prior to designating for comparative hearing. MCI disagreed with the proposed rule as too harsh. MCI agreed with Telocator's proposal to permit the second applicant to amend *nunc pro tunc*, bifucating into two requests, one clear of a conflict. It states that the clear application and any authorization should not be considered in a comparative hearing to avoid claims of prejudice.

100. We agree with the comments and are modifying the proposed rule. We are adding language to the effect that if an applicant requests a frequency which is mutually exclusive with another application that has previously been placed on public notice, it shall not request additional frequencies which are not mutually exclusive in the same application. Therefore, we are adding an objective test: if the first application has been placed on public notice, the second applicant is charged with actual knowledge and must request additional frequencies in separate applications. Any nonconforming application will be dismissed in its entirety. If, however, the first application has not appeared on Public Notice, we will assume that the second application violates the rule by chance, rather than by design. In such cases (expected to be few), we will allow the applicant to sever its mutually exclusive portion and to receive *nunc pro tunc* treatment for its additional frequencies or locations. Pursuant to this rule the request for additional non-mutually exclusive frequencies will be dismissed if they are filed on the same application. As we stated in the NPRM we believe our rule will expedite application processing of mutually exclusive applications and it is not burdensome on applicants.

101. *Transfer of Control or Assignment of Station Authorization, Section 22.39.* We proposed to revise this section to make it clearer, to indicate the forms to be used in these situations, and to eliminate unnecessary forms. Peters filed comments regarding proposed subsection (b)(5) (partial assignments) stating it was not clear. We

proposed for partial assignments that the assignee file a Form 408 if the facilities are to be incorporated into an existing licensed station and Forms 401 and 408 if a new station is to be established. The assignor will file an FCC Form 408. Peters suggested using the proposed Form 705 (Application for Assignment or Transfer of Control), with the permits or licenses for which assignments is desired specified thereon. Due to the administrative requirements the number proposed for Form 705 has been changed to Form 490.

102. Upon further review we have decided to modify our proposal. Both the assignor and assignee when requesting a partial assignment of a license will submit a Form 401. If the partial assignment is not completed within 60 days the assignor must file a Form 489 to return the license to its original specifications and the assignee must submit his authorization for cancellation. The rule adopted promotes our objective of expediting application processing and does not create additional burdens for applicants. It is also the result of careful consideration and scrutiny as to the type of information needed in these situations.

103. *Trafficking.* We proposed to eliminate the rule dealing with "trafficking" in licenses or construction permits in Section 22.40. This rule currently requires Commission review of a proposed transfer or assignment of a license to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever the applications for assignment or transfer involve facilities which have been operated for less than two years by the proposed assignor or transferor. The Commission reviews whether the proposed assignor or transferor acquired the authorization or operated the station for the principal purpose of profitable sale rather than public service.

104. Peters, Kadison, TDS, Hill and Offshore filed comments; Telocator filed reply comments. Peters, Hill, Kadison and Telocator support the proposal. Kadison urged that the section continue to apply where a station has been operated for less than one year and where it was obtained by the transferor or assignor by means of a comparative hearing or a lottery. Kadison further suggests that deletion of Section 22.40 in all circumstances could encourage use of straw men in lottery proceedings and would make a mockery of the comparative hearing process.

105. TDS and Offshore oppose the elimination of this section. They state that reliance on proposed Section 22.309 (Representations) is inadequate, especially in view of the lottery procedures. They also contend that it is a bad time to eliminate the trafficking rule because there could be increases in speculative applications. Offshore, like Kadison, suggests maintaining the rule when the authorization was obtained through a hearing or a lottery and the station has been operated for less than one year, in such a case the sale should not be made at a profit. Telocator in its reply comments

rejects Kadison's, TDS' and Offshore's arguments. Telocator states that it is not clear whether the present rule or the one proposed by the commenters will significantly ameliorate alleged abuses to the extent they do exist. Moreover, it is clear that the present rule substantially compromises a licensee's ability to respond to the marketplace.

106. As we stated in the NPRM, we believe that modification of the trafficking rule recognizes the reality of the marketplace. There are many situations when it is financially advantageous to sell a station even though it has been operated for less than two years. We proposed to recognize this and allow licensees more easily or readily to take advantage of these economic opportunities. We will modify our original proposal to conform the PMRS rule with similar rules recently adopted for the broadcast and Domestic Public Fixed Radio Services. *Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control)*, BC Docket No. 81–887, FCC 82–519, released December 2, 1982, and *Multipoint Distribution Service*, General Docket No. 80–112 and CC Docket No. 80–116, FCC 83–243, released July 15, 1983 (*MDS Decision*). In those proceedings, the Commission relaxed the anti-trafficking rules to permit free transferability of most licenses (*i.e.*, stations constructed); however, we retained a limitation on the transferability of licenses awarded after comparative hearings and on the transferability of construction permits. The limitation is simply that the Commission will review carefully any application for transfer of a construction permit or a license for a station operated less than one year. Essentially, we reserved the right to require the transferor to demonstrate that he was not speculating in authorizations to use the spectrum. *See MDS Decision*, *supra*, at paras. 142–145.

107. For the reasons stated in the cited proceedings, we will adopt a rule for Public Mobile Radio Services similar to Section 21.40, adopted in the *MDS Decision*, thus, we will review carefully any applications for transfer of an authorization of a facility which has not been constructed (construction permit)[29] or an authorization of a facility obtained as a result of a comparative hearing if the station has been operated for less than a year,[30] with one exception: we will not apply the rule to paging stations at 35, 43 and 900 MHz.[31]

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[29] This rule applies even if the authorization is obtained through a lottery.

[30] In cases of facilities operated less than a year our review will be limited to cases when the license was obtained after a comparative hearing. The rule will not apply to licenses obtained after lotteries. *But see* Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 48 F.R. 27182 at 27190 (June 13, 1983), FCC 83–114 released May 27, 1983.

[31] In reaching a determination to allow the transfer of construction permits in some circumstances, we recognize that prior Commission rulings have stated that any

We find that the public interest does not require any restriction on the transferability of authorizations in these services. In the past two years we have made available 28 channels for paging at 35 and 43 MHz (Dockets 19327 and 80–189) and 40 channels at 900 MHz, 37 of which are available for local paging (Docket 80–183). Thus, in each community nationwide there are now a total of 73 paging channels available where there used to be only 8.[32] We have accepted more than 5,500 applications for the 65 new channels, and we have granted hundreds of those so far. Only in a handful of cities have we received more applications for 900 MHz channels than there are frequencies available. To state the situation broadly, virtually all those who want paging channels can apply for and receive them. Consequently, the value of a bare construction permit to a prospective transferee should approach the cost to the transferee of applying to the Commission for his own new construction permit. With virtually open entry in paging and a very low likelihood that there are incentives to profit from the transfer of construction permits (or licenses held less than a year, for that matter), we see no public interest reason to restrict the transfer of paging authorizations.[33] Accordingly, we will adopt a revised Section 22.40 consistent with the *MDS Decision* except for lowband and 900 MHz paging.

108. *Term of Construction Permit, Section 22.43.* We proposed to revise this rule to provide that a station must commence operations within 12 months of the grant of the construction permit. We proposed to add language stating our policy not to grant extensions based on lack of financing, or lack of site availability. The proposed rule also provides for extensions necessitated by delays in obtaining state certification. Peters, Vega and FCBA filed comments.

109. Peters supports the proposal. Peters also asked for clarification on whether Section 22.43(b) (extension of time to complete construction) applies to cellular construction permits, and a statement that the Commission should permit extension of cellular

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sale of a bare license or permit for profit is prohibited by Sections 301 and 304 of the Act. *See, e.g., Amendment of Section 73.3597 of the Commission's Rules, supra.* While we may review that interpretation of the Act in the future, we do not believe that in circumstances where the construction permit or license has *de minimis* value as a result of market conditions, Sections 301 and 304 preclude the free transferability of permits and licenses. Where, as here, no public interest considerations weigh against allowing the transfers, we believe they may, and should, be permitted. However, we wish to make clear that our decision herein is not intended to in any way affect previous Commission rulings prohibiting for-profit sales to protect the integrity of our licensing process.

[32] Four of the existing paging channels (152.24, 152.84, 158.10, 158.70 MHz) are allocated equally between wireline companies and radio common carriers, and these channels are fully utilized in most large markets. We will not include these channels in our rule until we determine whether to abolish the separate allocation in the companion NPRM.

[33] We will award mutually exclusive channels by lottery rather than comparative hearing; thus, the comparative hearing reservation does not apply here.

construction permits in appropriate circumstances. Vega suggested that in subsection (a) the date of grant of the application be the Public Notice of announcement of that action. FCBA suggested that the proposed rule be amended to provide that if the permittee shows it has been "reasonably diligent in pursuing state certification, a reasonable extension of time will be granted. Telocator supports extending the construction permit term to 12 months and codifying the policy denying extensions based on lack of financing. Telocator disgrees with denying extensions based on lack of site availability, stating that the rule should allow for the possibility that unavailability of the site may be beyond the permittee's control. The staff should have discretion to grant an extension upon an adequate showing. Telocator reiterates its proposal to create an objective basis for determining due diligence concerning state certification, discussed in Section 22.13, *supra*.

110. In conformance with our new procedures we have changed the title of this section to Period of Construction. Thus, after the radio station authorization has been granted, the licensee will have 12 months to complete construction. We disagree with Vega that the date of grant of the application should be the public notice announcement of that action. Most of the time the applicant receives the authorization before the action is placed on public notice. The time lag is typically one or two weeks. Occasionally, mechanical or other problems with our equipment can delay issuance of the authorization beyond the public notice date. For uniformity and consistency, we will rely on the grant date printed on the authorization. As to FCBA's and Telocator's suggestion regarding state certification, we are adopting a presumption to determine whether the applicant has acted with diligence in pursuing state certification. We are providing that if the licensee files for state certification within 90 days of the license grant, a presumption of due diligence is created. We have also added the same presumption for extensions of time based on failure to order equipment (see discussion of Section 22.13). We are not persuaded by Telocator's comments that extensions of time should be granted for lack of site availability. As we stated in the NPRM, we believe that only in unusual cases will lack of a site be beyond the permittee's control. Licensee should be able to make arrangements for a site without prolonging the construction period. In addition, at the time of filing an application the applicant certifies that it has obtained reasonable assurance that the site is available; thus, lack of a site should be the exception and not the rule.[34]

111. *Termination of Authorization, Section 22.44.* We proposed

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[34] In reply to Peters' question we note that subsection (b) (extensions of of time to complete construction) is a rule of general applicability to all the radio services covered by this Part.

to revise this section to clarify it and to include our policy that a construction permit will be forfeited where the permittee is denied state certification and the state appeal process has been exhausted.[35] Peters and Telocator filed comments concerning the proposal.

112. Peters states that Section 22.44(a) (termination of authorization) is too narrow, and suggests that all authorizations, construction permits and special temporary authorizations shall automatically terminate upon failure to comply with the conditions in the authorization. We proposed that special temporary authorization shall automatically terminate upon failure to comply with the conditions in the authorization. All other authorizations shall terminate on the date specified on the authorization or on the date specified by the rules. Telocator agrees with the proposed rule and reiterates its proposal that a construction permit be deemed forfeited if the permittee has not applied for state certification within 90 days of acceptance of the application for filing, discussed in Section 22.13, *supra*.

113. Concerning Telocator's proposal, we have included a presumption in Section 22.43 for due diligence in pursing state certification. With regard to Peters' proposal, Section 22.43 already provides that an authorization will automatically expire if the licensee has failed to complete construction within the period provided in the rule and has failed to timely request an extension of time to complete construction. We see no reason to impose the additional measures advocated by Peters when there are other procedures for dealing with licensees who fail to comply with the conditions in their authorizations, e.g., forfeitures or license revocation. We will adopt the rule as proposed.

114. *License period, Section 22.45.* We proposed to clarify this section which states when licenses expire. Kadison and Telocator filed comments, and Telocator and TDS filed reply comments.

115. Kadison recommended staggering license renewals, with one fifth of the stations applying for renewal each year, to ease administrative burdens. Telocator and TDS recommended revising the license term to 10 years pursuant to the Communications Amendments Act of 1982, *supra*. In its reply comments Telocator rejects Kadison's proposal to stagger license renewals, as increasing administrative burdens.

116. In *Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendments Act of 1982*, CC Docket 83–371, FCC 83–276, released June 9, 1983, this rule was amended to provide that licenses will be granted for 10 years in accordance with the 1982 amendments to the Communications Act. We are not persuaded that staggering the ten-year renewal cycle is more efficient and less burdensome than requiring all renewals for a

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[35] Hazle-Tone Communications, Inc., FCC Mimeo 6645, released February 10, 1981.

particular service in the same year. Accordingly, we will adopt the rule as proposed.

117. *Frequencies, Interference, Section 22.100.* We proposed to amend this rule to state more clearly existing rules concerning interference matters and to codify several interference policies. We also proposed to codify our policy with respect to mobile-to-base and mobile-to-mobile interference, namely, to state explicitly that we do not act upon this type of interference complaint. Peters, Comp Comm and Telocator commented on the proposal.

118. Comp Comm disagreed with subsection (b)(5) (mobile-to-base, mobile-to-mobile interference), stating that the presumption we relied upon in the NPRM, that there are technical measures to eliminate this type of interference, is not entirely correct. Comp Comm states that the rules do not consider interference when a station is proposed that accepts a large amount of interference from an existing two-way facility while still offering full protection under the Carey Formula to that existing station. It suggests revising the rule to require applicants to offer full Carey protection to existing facilities and not be permitted to accept base-to-mobile interference. It asserts that the concept of a proposed two-way facility accepting base-to-mobile interference while offering full base-to-mobile protection is equivalent to authorizing the mobiles of the proposed facility to destroy the mobile-to-base transmissions of the originally authorized facility. Comp Comm agrees that protection of a base station receiver from mobile interference is not justified solely to eliminate noise in an idle base station receiver, particularly since there are technical means available to eliminate the problem.

119. Telocator also disagreed with subsection (b)(5), stating that the proposed language is unnecessarily and unadvisably categorical. Telocator suggests that the rule be worded such that protection against mobile-to-mobile or mobile-to-base intereference will be considered on a case by case basis. Telocator also suggested as a technical correction that 22.100(g) should reflect that control and repeater stations may be authorized in the PLMS at 928–929 MHz, by adding at the end of paragraph (g) ". . . except as provided in § 22.501(g)(1)."

120. We are not persuaded by Comp Comm's and Telocator's suggestions concerning (b)(5). We will not offer protection for mobile-to-base or mobile-to-mobile interference. Our rules do not protect a licensee from the reception of a co-channel signal of a mobile unit operating in accordance with Part 22. A licensee not wishing to receive radio signals from mobiles not affiliated with its service may, for example, reduce the sensitivity of its base station receiver so that signals from mobiles beyond its reliable service area contour (RSAC) are generally beneath receiver threshold. Another technical measure is available to a licensee which does not wish to receive signals from any nonsubscribing mobile, even if it is within the licensee's

RSAC. The base station receiver may be modified to accept a signal from only those mobile units which the licensee desires to serve by equipping it for tone-coded signals. If mobile units and the base station receiver are properly equipped, only those mobile units prefacing their normal signals with a unique code can have their signals detected and amplified by the base station receiver.

121. The key characteristic of the Public Land Mobile Service is the "mobility" of "mobile" units. They will frequently be moving from place to place, sometimes many miles from the RSAC of the licensee to which they subscribe. Many carriers specifically offer service to roamers as transient service. Unless its base station receiver is equipped not to detect and amplify the signals of mobile units subscribing to a different licensee, a licensee should anticipate receiving such signals, even if it considers them to be interfering. There is not now, nor has there ever been, any rule, policy or practice requiring mobile-to-base protection. We also believe it is excessively burdensome if not impossible to deal with this matter on a case by case basis. If we offered protection for this type of interference, it likely would prompt licensees to use this as a complaint mechanism to try to keep new carriers out or to protract the processing of their applications. Furthermore, we would not be surprised to see licensees attempt to use the complaint procedure as a competitive ploy against each other. Subsection (g) has been corrected as Telocator pointed out. In view of the above, we will adopt the rule as proposed.[36]

122. *Frequency Tolerance, Transmitter Measurements, Sections 22.101, 22.102, 22.207.* We proposed to make various changes to Section 22.101 and to delete Sections 22.102 and 22.207. The transmitter measurement requirements in Section 22.207 would be simplified and placed in Section 22.101(b). We proposed to specify frequency tolerance limits, and leave it to the licensee's judgment to conform to these standards. Motorola and Telocator filed comments, pointing out errors in the rule.

123. Motorola points out that the mobile station tolerance for the 450–470 MHz band should be corrected to .0005 and that the footnote beginning "Below 512 MHz" (note 1) could be deleted as it no longer serves any useful purpose. Output, rather than input, power is now used in all bands so that this notation is no longer required. Telocator has similar comments, observing that the frequency tolerance for mobiles in the 470–512 MHz band should be .0005 and that base stations in the 821–896 MHz band may not exceed .00015 and mobiles .00025. We agree with the comments and have corrected the rule accordingly.

124. *Standards governing use of 72–76 MHz band, Section 22.103.*

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[36] We have followed Peters suggestion and added the term "repeater stations" to paragraph (b)(6).

We proposed various revisions to this rule section, mainly to eliminate duplication. Only Peters commented on the proposal. Sections (b) and (c) establish parameters to be followed by applicants proposing stations located between 10 and 80 miles from TV channel 4 or 5 in the 72–76 MHz band. Peters suggested that there should not be an absolute prohibition as proposed is subsections (b) and (c). Peters believes that there should be some provision for operation of 72–76 MHz transmitters where an adequate showing is presented which clearly indicates no threshold interference. Peters further states that if interference does occur after installation, corrective measures are available.

125. We are not persuaded by Peters' proposals. As we stated in the NPRM, our current rule provides that applications for use of the 72–76 MHz band less than 10 miles from TV channel 4 or 5 stations will be returned without action. This policy was adopted in order to avoid harmful interference to television signals. If, however, the transmitter is co-located with the television transmitter, harmful interference is actually minimized. We have regularly granted waivers in these cases. We proposed, therefore, to update the language in this section to take into account the co-location situation. In the NPRM we also rejected a proposal from Beehive Telephone Company similar to Peters' here. We reiterate that this rule is necessary to prevent or correct this type of interference.

126. *Emission types, Section 22.104*. We proposed to clarify this section which provides for the types of emissions permitted in our services. Peters and Motorola suggested including F9Y, an emission used in digital systems, as an authorized type of emission. Motorola states that authorizing this emission will assure routine approval of systems proposing it and that the NPRM indicated support for digital techniques. We agree with the commenter and have included this type of emission in the rule being adopted. We believe this adds flexibility to our rules concerning digital transmissions. *See also* discussion of Section 22.106 *infra*. In accordance with this rule we have amended Section 22.507 and eliminated Sections 22.603 and 22.1003.

127. *Emission Limitations, Section 22.106*. We proposed to amend this rule to provide, *inter alia*, for systems employing digital modulation techniques. We also requested comments on whether rules should be added to specify the circumstances under which digital systems may operate, and to allow flexibility regarding in-band use of assigned frequencies.

128. Comments were filed by, IMM, AT&T, and Offshore Telephone. IMM supports the proposed provisions for digital transmissions. IMM states that the Commission should recognize that digital is not synonymous with nonvoice that this confusion appears in the Commission's explanation for the proposed changes to this section. IMM also supports permitting licensees to manage their in-band

transmissions with greater flexibility, in particular establishing multi-voice channels (transmission channels) within the standard 25 kHz bandwidth. This flexibility, asserts IMM, would allow licensees to operate with greater spectrum efficiency. IMM also requests that consideration be given to the possibility of allowing greater "cross-band" flexibility of multiple assigned frequencies. In other words, when one operator holds licenses for a small group of contiguous frequencies, it may be feasible and desirable to allow the operator to regard this channel group as common, or in essence, one large channel. IMM recommends that the Commission refrain from regulating the manner in which the operator divides this "meta channel" into specific individual voice channels, as long as it does not cause interference for other operators at adjoining frequencies. IMM asserts that by means of packet-switching, TDMA (time division multiple access), and related techniques, this form of trunking would encourage greater spectrum efficiency by making it possible for operators to utilize portions of the current guardband between channels in their channel group. IMM further asserts that this may become feasible with certain digital modulation schemes in which adjacent-channel interference can be adequately controlled with a reduced guardband requirement.

129. AT&T agrees with the proposed rule assuming any emission may be used if the transmitter has been type accepted for such an emission under Part 2. Offshore opposes allowing existing licensees to freely split their authorized spectrum. It asserts that the use of interstitial frequencies should be considered by the Commission on a service by service basis (e.g., mobile, rural). Offshore states that the rules must provide for strict frequency coordination.

130. We believe the suggestion made by IMM has merit. We have given considerable thought to allowing applicants to use any emission mode; it would be advantageous to allow licensees (and new applicants) flexibility in choosing the type of emission mode they use and to the extent possible, the amount of bandwidth they occupy in all frequencies licensed under Part 22. Provided technical feasibility could be demonstrated, such flexibility would permit combinations of modulation and bandwidth that best serve the public interest. However, the only data available to us on modulation techniques which could justify authorizations is on amplitude compandored single sideband modulation, although that data is limited in scope. Therefore, we will authorize the use of amplitude compandored single sideband modulation pursuant to the following requirements. Applicants proposing to use amplitude compandored single sideband modulation must demonstrate that the proposed facilities will not cause harmful electrical interference to known pending and licensed amplitude compandored single sideband and FM stations in excess of the ratio of desired-to-undesired field strengths as is presently required for FM co-channel interference. The interference studies

will be made in accordance with Section 22.15 of the rules. Out-of-band emissions will be restricted to that required for an FM station on an assignable frequency, in accordance with Sections 22.106, 22.501, 22.600 and 22.1000, to assure that this approach will not create greater interference levels than currently allowed. This plan allows applicants to establish more than one channel within this defined authorized bandwidth. For example, it is believed possible to insert several amplitude compandored single sideband channels within the authorized bandwidth, provided that the total peak envelope power of all the channels so inserted is accounted for in supporting interference studies, and the assumption is made that the total effective radiated power is that at an assignable frequency and the antenna-center height above average terrain is the highest of the various proposed antennas. We believe this approach will encourage more efficient use of the spectrum while still protecting from harmful electrical interference.[37] We intend to treat such proposed multiple amplitude compandored single sideband cahnnels within an authorized bandwidth as a single channel on an assignable frequency for traffic loading study purposes, so as not to penalize anyone for efficiency.[38] However, we will look at each request on its own facts. Applications proposing amplitude compandored single sideband modulation employing greater total effective radiated power or other types of emissions will be considered on a developmental basis. Regarding IMM's suggestion that adjacent channels of assignable frequencies should be able to be grouped to form one large channel, we also believe this approach may have benefits. The present record is insufficient however, to support its adoption. Within the limits of our resources, we hope to undertake further evaluation of this approach.

131. *Transmitter power, Section 22.107.* We proposed to delete portions of this rule which have become obsolete through developments in technology. We proposed to eliminate the provisions relating to maximum power output authorized for transmitters, and instead continue to request rated power output as a means of computing effective radiated power (ERP). Peters suggested that this rule be omitted as unnecessary because it does not provide regulatory standards.

132. We disagree with Peters' suggestion. The proposed rule informs applicants that they should only use the amount of power needed for their system (i.e., not exceeding the output power for

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[37] We believe this approach will protect existing users employing frequency modulation. The Commission is examining certain technical regulations in A Re-Examination of Technical Regulations, Gen. Do. 83–114, FCC 83–67, released March 16, 1983.

[38] This flexibility is consistent to that which we have adopted for 900 MHz systems. See 900 MHz stations, 89 FCC 2d 1337 (1982), at para. 67.

which the transmitter in question has been type-accepted). However, we do not think it is necessary that the rule particularly specify the maximum rated power of a transmitter. We are more concerned with interference and coverage, which is a function of ERP. ERP is a function of power output, losses between the transmitter output terminals and antenna input terminals, and antenna gain (Sections 22.505 and 506). Therefore, in light of the above we will adopt the rule as proposed.

133. *Directional Antennas, Section 22.108*. We proposed to restate this rule in positive terms and delete various sections which do not apply to Part 22. The rule would describe when directional antennas are required and, in these situations, the required beam width. Comp Comm and IMM commented on the proposal. Comp Comm suggested that the rule specify what the applicant has to submit with the application if it proposes using an antenna radiating power in an other than an omni-directional manner. Comp Comm suggests that the following be required: if the radiation pattern is in any way being determined by the mounting structure, applicants should supply engineering drawings showing the size and shape of the structure, antenna mounting configuration with reference to the structure, orientation of antenna and mounting structure relative to true north. It asserts that this will ensure that the proper directional pattern is being used and, ultimately, that the facility can reasonably be expected to radiate as proposed. IMM suggested that the Commission eliminate the requirement that rural radio subscribers necessarily use directional antennas. It states that there are some situations where a directional antenna for local distribution makes no economic or technial sense. IMM proposes that subsection (a) be amended to allow use of omnidirectional antennas in rural radio service when communicating to only one point.

134. We agree with Comp Comm's suggestions that the rules should require an additional engineering showing for side mounted antennas and we have amended Section 22.15(j)(4) accordingly. However, we are not persuaded by IMM's proposal that we should, as a general matter, allow use of other than directional antennas in the rural radio service. This provides more efficient use of the spectrum. The rule we are adopting provides that a multi- or omni-directional antenna may be authorized upon a proper showing where a station communicates with more than one point. This accommodates IMM's concerns.

135. *Antenna Polarization, Section 22.110*. We proposed to clarify this section by adding headings for the types of polarization discussed and revising the language into a more readable format. This rule specifies which stations shall employ vertically, horizontally or circularly polarized antenna signals. Only Peters and IMM commented on the proposal. Peters suggests that we retain the substance of the current rule. Peters asserts that under the proposed

rule a licensee lacks discretion to utilize polarization techniques in designing radio systems. In addition, Peters states that polarization techniques can prevent or minimize harmful interference. Finally, Peters argues that polarization changes have been and should continue to be major changes. IMM disagreed with proposed subsection (c) and suggest it be amended to allow any station without excluding the stations described in paragraph (a) as we proposed, to radiate a circularly polarized signal upon a satisfactory showing. It also suggested using the strength of the vertically polarized components where necessary for allocation purposes, since this corresponds to the "normal" orientation of a mobile or portable antenna. IMM also recommended that the section be expanded to allow, upon a satisfactory showing, for elliptical polarization and feedback controlled variable polarization.

136. We disagree with Peters' comments; we believe the proposed rule does retain the substance of the current rule. In addition, the comments have not persuaded us that we should change the rule at this time. Allowing the use of circular polarization or any other type of polarization may increase interference potentials. We do not have sufficient data in these services at this time to allow use of these types of polarization. However, if applicants can demonstrate that interference potential would not be increased we would consider a request for use of other types of polarization. Changes in polarization will be considered major changes.

137. *Topographic Data, Section 22.115.* We proposed to rewrite this section into plain English and eliminate unnecessary specificity. This rule provides the method for determining average terrain elevation. Peters, Vega, Comp Comm, Motorola and All Florida filed comments. Fletcher and Peters also filed reply comments. We have also considered informal comments from Jubon.

138. In subsection (a)(2) we proposed to keep the current language in the rule requiring that at least one radial include the principal community to be served. Peters, Vega, Comp Comm and Motorola suggested that this section be eliminated on similar grounds. Peters, for instance, states that the reliable service area is fixed to a certain contour value and there is no other required reporting procedure or signal level over a principal community. We agree with the comments and we have therefore eliminated the "principal community" language from this section.

139. In proposed subsection (a)(3) we kept the language requiring radials to be drawn to co-channel or adjacent stations within 75 miles and added language requiring that stations in the 470–512 MHz band plot additional radials to co-channel TV stations. Peters suggested eliminating this subsection since there are thousands of stations operating in the 470–512 MHz frequencies, most of which require no terrain analysis. Peters believes this section could be deleted without affecting existing television stations. Peters goes on

to state that the entire section can be deleted because interference to stations within 75 miles is already specified in Form 401 and in other places. The showings required for co-channel station interference studies could be unified in Section 22.15. Vega, instead, suggests that the paragraph be rewritten as "additional radials shall be drawn to co-channel stations within the applicable interference distances."

140. We are not persuaded by the comments. We believe the rule as proposed is necessary to assure interference-free operation and to avoid problems before they occur. The burden on applicants is small.

141. In subsection (a)(4) we proposed, in response to a request by the Mobile Services Advisory Committee, to clarify what is included in average elevation when a portion of a radial extends over water or foreign territory but crosses U.S. land. We proposed that in these cases the portion of the radial shall not be included on the profile graphs or in the computation of average elevation unless the radial passes over U.S. land within 83 miles of the station. Peters suggests eliminating (a)(4) because the requirement relating to stations within 83 miles is superfluous and the calculation of average elevation over any distance of water is neither time-consuming nor difficult. Peters reasons that eliminating (a)(4) would provide a more conservative estimation of the radiation center heights of all stations in these circumstances inasmuch as the present rules often result in understating the antenna height above average terrain by a considerable amount.

142. Vega suggests that this subsection be written to indicate that radials over foreign territory or water shall not include water or foreign territory as part of the average terrain calculations. Comp Comm suggests that (a)(4) be modified so that the radials over water or foreign countries be included in the profile graphs and in the computations of average elevations. It reasons that excluding them leads to a need for defining when the exclusion is appropriate and the only valid reason would be a total absence of terrain elevation information for paths over foreign countries.

143. We are not persuaded by Peter's or Comp Comm's comments and we will adopt the rule as proposed. When a portion of a radial extends over foreign territory or water, such portion shall not be included on the profile graphs or in the computation of average elevation unless the radial passes over U.S. land within 83 miles of the station. We believe keeping this requirement is necessary because its elimination could potentially increase the effective radiated authorized power, thus decreasing co-channel protection to neighboring co-channel licensees.[39]

144. We proposed to add language concerning assumed average

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[39] Vega suggests that the section be eliminated since the profile graphs will not be filed with the application. As was the case in Section 22.15(j), there is a need for applicants to prepare the profile graphs even though they will not be filed as a matter of course. The graphs are used too infrequently by the staff to require all

elevation in certain areas, for instance 10 feet for Miami, Florida. In the NPRM we requested comments concerning other areas in which average elevation can be assumed. All Florida suggests that subsection (c) include at a minimum, the Miami Urbanized area, and preferably all of Dade and Broward Counties. It contends that the terrain is virtually flat throughout Dade and Broward also. We agree with All Florida and are including Dade and Broward Counties in the rule.

145. In this section we also proposed to keep the current language in the rule that the average elevation of the 2 to 10 mile portion of each radial shall be determined from the profile graphs. Various parties addressed the use of computerized data bases to calculate average terrain.[40]

146. As stated in our discussion of Section 22.15(j)(8), we agree with the comments that this is a very good idea. It will reduce the cost of applications for the public, and the computer generated information yields relatively accurate results. Consistent with Section 22.15(j)(8), we will add a subsection (2) to paragraph (c) of this section to allow the use of computer generated information in the computation of average terrain elevation.

147. *Transmitters, Section 22.117.* We proposed to combine Sections 22.117 and 22.118 into one rule since both deal with transmitters. In subsection (a) we kept the language concerning location of transmitters and eliminated the language concerning engineering considerations to be used in selecting transmitter sites. Peters, Comp Comm and Telocator commented on the proposal. TDS also filed reply comments.

148. Peters suggested that the phrase in subsection (a), "urban population of the area to be served" should be deleted because it is ambiguous and troublesome, for instance, in contiguous urban areas like the Northeast corridor. We agree and have eliminated the proposed section (a) in its entirety because it does not provide useful information or guidance.

149. In proposed subsection (d) we provided that additional transmitters[41] may be constructed without Commission authorization, so long as the Commission is notified (Form 408), and the

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applicants to submit them. In order to relieve burdens both for applicants and the staff, we will require them on an as needed basis. This section is necessary because it describes the method for determining average terrain elevation.

[40] Jubon petitioned for declaratory ruling on whether the current section allows the use of the National Telecommunications and Information Administration (NTIA) Topographic Data Base in Boulder, Colorado, as the primary topographic data source and average terrain elevation determinations. We are treating it as informal comments in this proceeding.

[41] The reference to fill-in transmitters in the NPRM at p. A-104 was incorrect. In this section we are referring to additional transmitter locations on the same frequency, that do not require prior Commission approval, not to fill-ins which may increase the reliable service area and interference contours.

authorized service area is not increased in any direction. We also added specific provisions describing when this may be done.

150. Telocator, Peters, Comp Comm agreed with the proposal. Telocator had one caveat: that co-channel licensees must be protected. Telocator suggests adding a phrase after the word "area", in (d)(1), to read "and predicted interference contour." Telocator states that the system's reliable service area or its predicted interference contour should not be expanded by fill-in transmitters. Peters, TDS and Comp Comm also suggested that construction of fill-in transmitters should be placed on Public Notice and interested parties should be allowed to review and comment on such stations, even after the fact, in view of potential interference. Comp Comm also suggested that the Commission require a complete engineering showing, with full average terrain information, to demonstrate that the fill-in is really a fill-in and does not enlarge the service area. TDS also suggested incorporating in this section its recommendation concerning Section 22.23(c)(2), relocation of base stations. It suggests that subsection (d) should read: "licensees may construct and operate additional transmitters or relocate existing transmitters without obtaining prior Commission approval, provided: (1) the currently authorized service area of the transmitter or system of commonly owned transmitters is not enlarged in any direction. . . ."

151. We agree with Telocator's proposal to add language concerning "predicted interference contour" to this section. We are requiring that Form 489 be submitted with a certification that the reliable service area contour and the predicted interference contour of the proposed station are totally contained within the reliable and interference contour of the existing station. We also accept TDS' recommendation for commonly owned transmitters and will add language to this effect in Subsection (d)(1).

152. *Replacement of equipment, Section 22.121.* We proposed a less burdensome alternative to the current notification requirement when equipment is replaced. Instead of notifying the FCC each time a change is made, the licensee would include such changes as a part of the next application filed (e.g., renewal or major modification). We proposed to retain the present requirement that only type accepted equipment be used. Peters, Comp Comm and Offshore commented on the proposal.

153. We proposed in the NPRM that a licensee may replace any equipment without authorization (1) if the antenna height or antenna structure height, whichever is greater is not increased above the authorized height; and (2) if the equipment does not cause the station to increase its effective radiated power in any direction, or otherwise violate the rules in this part. Peters suggested that the phrase "antenna height" in subsection (a)(2) should be changed to "radiation center height". Peters also suggested that the section be clarified as to the effects of a licensee lowering his radiation center

height or effective radiative power by a permissive change. Peters questions whether the change and subsequent notification serve to reduce the licensee's authorized height or power or whether they remain as initially authorized. Peters further questions whether the licensee would have authority to increase his height or power back to the originally-authorized limits without prior Commission approval.

154. Comp Comm suggests that the Commission require that an amended Form 489 be filed for any power reductions and equipment substitutions and that they be listed on public notice. Offshore states that the language in the rule appears to be broad and should be clarified. Offshore believes the rule should allow free interexchange of equipment as long as the characteristics of the authorization remain the same, e.g., frequency, power and emission.

155. We will not adopt Peters' suggestion to include "radiation center height" in subsection (a)(2). Section (a)(2) provides for changes in antenna height or antenna structure height for air navigation purposes. Therefore, we require information as to the height to the tip of the antenna or antenna structure. Subsection (a)(3) deals with propagation information which includes antenna radiation center height and effective radiated power (ERP). As to Peters' question concerning a licensee lowering his radiation center height or ERP, this would be a minor modification requiring the filing of a Form 489. *See* Section 22.9(d). To further clarify our rules concerning replacement of equipment, we provide in Section 22.121(a) that equipment may be replaced without prior authorization only if the equipment is type-accepted, there is no increase in the antenna height or antenna structure height, and there is no increase or decrease in the reliable service area contour. This also responds to Comp Comm's comments.

156. *Operator and Maintenance Requirements (Licensee Responsibility), Section 22.205.* We proposed to simplify and relax our operator and maintenance requirements, and to provide that no operator's license will be required for a person to operate or perform maintenance on facilities authorized in these radio services. We also proposed to add a new subsection establishing a general standard that licensees will be responsible for the proper operation and maintenance of their facilities. Peters, Vega, Motorola, AT&T, Pagenet, and Offshore commented on the proposal.

157. Peters, AT&T and Pagenet agree with the proposal. Vega suggests that the phrase "the agreement shall be in writing" in subsection (b) should be deleted because it has no merit today. In this subsection we proposed that when maintenance of a radio station or antenna structure is provided for by agreement with an entity unrelated to the licensee, the agreement shall be in writing.

158. Motorola and Offshore disagree with the elimination of the requirement that maintenance and transmitter measurements be performed by an FCC licensed technician and that transmitter

measurements be recorded when the work is done. Motorola states that it is not convinced that this area can be left to the marketplace or that the operator's status is inconsequential. Motorola believes the examinations to be an FCC licensed technician bear a relationship to a technician's competence. Motorola further asserts that the best method to ensure compliance and minimize interference is to maintain, with some modification, the rules requiring an FCC licensed technician.

159. We will adopt the rule as proposed. The rule is consistent with our policies and eliminates unnecessary regulations. We find that pursuant to Section 318 of the Communications Act, waiver of the operator licensing requirements is in the public interest. The Commission is currently studying eliminating these requirements in various other services, *Requirements for Licensed Operators in Various Radio Services, Notice of Proposed Rulemaking*, FCC 83–113, released April 20, 1983 and has already decided, in Docket 20817, 46 FR 35450, that it is no longer necessary to require that broadcast stations be operated and maintained only by persons who hold operator licenses based on examinations. We have also abolished the Broadcast Endorsement, the Radiotelephone Third Class Operator Permit, and the Radiotelephone First Class Operator License. We continue to believe that it is necessary that the maintenance agreement be in writing. Since we are eliminating various related requirements, we believe the requirement of having the maintenance contracts in writing assures accountability for proper operation.

160. *Station Identification, Section 22.213(d).* We proposed to revise this requirement to ease the burden of station identification. We proposed that the station identification shall be made every half hour.[42] Comments were received from Flight Infolk, Motorola and Offshore.

161. Offshore and Flight Infolk both request that the rule accomodate the use of an automatic tone signal. Offshore also disagreed with the half hour requirement because it could be disruptive of data transmission. Offshore states that with automatic tone signaling, identification is required at the start and the end of transmissions, and this is sufficient. Motorola requests clarification of whether identification is only required during periods when the transmitter is in use.

162. We agree with Offshore and Flight Infolk and have included automatic tone signaling in the rule. As to Offshore's recommendation, we will not modify the rule to include an exemption from the half hour station identification requirement because we have not been persuaded that it is necessary. A data transmission less than

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[42] We note that our discussion in the NPRM was not entirely accurate in stating that three repetitions are required every half hour.

one-half hour with identification before and after the transmission would meet the requirement in any event. As to Motorola's request for clarification, this is covered by paragraph (a) of this section which requires identification with each communication or exchange of communication; thus, if there is no communication, there is no need for station identification.

163. *Discontinuance of station operation, Section 22.303.* We proposed to revise this section to make it more concise and practical, eliminating the burdensome notification requirements associated with temporary discontinuances. In addition, we added a presumption that a station will be considered to have been permanently discontinued if operation ceases for 90 days. Peters agreed with the proposal, provided that the 90 day rule should not apply if the licensee notifies the Commission to the contrary. Peters states that there may be circumstances where operation must cease for more than 90 days.

164. We agree with Peter's comments and have included a notification requirement in the rule. Thus, the licensee will notify the Commission within the 90 day period that the discontinuance of operation will last longer than 90 days and include a date when operation will resume, which shall not be in excess of 30 additional days. If a licensee has not operated during all this time, he has not complied with his duty to provide service to the public and should, therefore, lose his license.

165. *Tariffs, other reports, Section 22.304.* We proposed that this rule explicitly state that we require radio common carriers to file Form L (Annual Report). Peters and USITA filed comments. MCI filed reply comments. Peters and USITA suggested deleting the reference to Form L. MCI in reply comments suggested that wireline carriers be required to file Form L also or that radio common carriers be relieved of this requirement.

166. We will revise the proposed rule to delete the reference to Form L. The filing of this Form was eliminated on October 27, 1982. See CC Docket No. 82–85, *Report and Order*, FCC 82–451, released October 27, 1982,[43] *recon. denied* FCC 82–142, released April 19, 1983.

167. *Incidental Communication Services, Section 22.308.* In the past, the Commission has approved licensee requests to use their frequencies and facilities to provide "incidental" communications service (e.g., weather information and stock market quotes). We proposed to add a rule stating the general conditions under which incidental communications services may be provided. We found that incidental services meet a public demand and can be fashioned so as to make more efficient use of spectrum without interfering with the growth or availability of public mobile radio service.

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[43] 47 Fed. Reg. 50694.

168. All parties addressing proposed Section 22.308 support the Commission's approval of incidental services, although they differ in regard to what, if any, standards the rule should impose. MCI disagrees with the idea of formal Commission authorization or monitoring of incidental services. MCI argues that the marketplace will assure efficient, effective utilization of the spectrum, and surveillance of the kind or content of such service is inappropriate where communications will be private even though transmitted by common carriers. MCI further suggests that in the interest of competitive equity, the Commission should not restrain RCCs from offering the same services which broadcast licensees may be able to offer if the Commission adopts the Notice of Proposed Rulemaking in the FM Subsidiary Communications Authorizations (SCA) proceeding. BC Docket No. 82–536, 47 Fed. Reg. 46118 (1982).[44]

169. MCI supports Kadison's suggestion to delete proposed subsections (b) and (c) which provide that the costs or charges of subscribers not using the incidental services may not be increased and that the quality of service may not deteriorate. MCI and Kadison would modify subsection (a) to refer to electrical interference only, rather than interference "with the public mobile radio service." Kadison and MCI express confidence that the marketplace will fairly and efficiently regulate price, quality and availability of service, without the excessive litigation often engendered by administrative standards.

170. We also sought comments on whether prior approval should be required. Kadison considers unnecessary prior Commission approval of incidental service offerings, stating that prior notification, including a general description of service and explanation of how it will work, would fully protect all parties concerned without producing any unnecessary burden or delay in administrative processing.

171. AT&T supports the rule provided that the incidental service does not exceed 10 percent of the total airtime usage of the applicable frequency. In the same vein, until incidental services are clearly defined, AT&T would not allow applicants for additional channels to count incidental services more than 10 percent of total channel occupancy time under Section 22.516 (demonstration of need for additional channel). In addition, AT&T suggests that the qualifying term "materially" precede "deteriorate", and that the phrase "beyond a minimal degree" follow the word "diminish" in subsection (c). The foregoing provisions are necessary, states AT&T, because insertion of any incidental service, will have some impact, however slight, on the authorized service and growth and availabili-

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[44] The Commission did authorize non-broadcast use of SCAs in its First Report and Order, Amendment of Part 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communication Authorizations, FCC 83–154, released May 19, 1983. (53 RR 2d 1519 (1983).

ty will necessarily be reduced by the amount of airtime used for incidental service.

172. AT&T disagrees with the proposal to treat service to vessels and rural subscriber stations as incidental communications. AT&T argues that service to these stations should not be considered incidental communications; nor should a licensee be required to notify the Commission of the provision of these services to customers. Finally, AT&T proposes that service to vessels and rural subscriber stations be included in airtime measurements used to show the need for an additional channel.

173. In their reply comments, MCI and Telocator criticize AT&T's 10 percent limitation as an arbitrary and unnecessary standard. The commenters believe any such limitation will likely inhibit subscriber choice and frustrate the inauguration of incidental services in newly implemented or as yet lightly loaded systems. Telocator foresees enforcement problems as well, noting that Section 605 of the Communications Act prevents monitoring by anyone other than the Commission. And, while channel occupancy data ostensibly would serve as a self-regulating measure, a carrier could easily subvert the data by limiting incidental services to 10 percent of airtime only during the busy hour. It is loading during the busy hour that determines need for additional channels. Telocator is not persuaded that 10 percent, let alone any percentage of airtime (as opposed to revenues or some other criteria), is an appropriate standard and suggests, along with MCI, that the balance be left to the marketplace where individual carriers generally may be relied upon to optimize their competitive posture by providing the best possible service.

174. Telocator also takes issue with AT&T's proposal to further qualify subsection (c). Telocator contends that AT&T's modifying terms are implicit in the Commission's proposal and the concept of "incidental" and that the terms proposed by AT&T could breed litigation. To the extent the proposed qualifications impose potentially overly restrictive limitations in incidental service, Telocator concurs with Kadison and MCI that subsection (c) should be deleted.

175. Peters agrees with the proposed rule provided the term "incidental service" is carefully defined so as not to limit DPLMRS development. Peters suggests that service be labelled incidental "if the licensee's subscribers who receive a specific service each do not pay a discrete, clearly identified cost for the service. If the service serves the public interest (i.e., conforms to FCC policy and is individually subscriber-supported), it should be a regularly-authorized service" according to Peters. Noting the Commission's proposal[45] to authorize provision of common carrier-like functions on FM

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[45] BC Docket 82–536, *supra*.

subcarriers, Peters would view "incidental services" as the offering of broadcast-like services on a secondary basis.

176. Telocator questions how this discrete fee test proposed by Peter's serves its purported rationale of avoiding the arbitrary limitation of DPLMRS development. The definition in Telocator's view seems to beg the question of whether classification hinges on the carrier's decision to bill. Telocator thus cautions against defining "incidental service."

177. MTC also commented on the proposed rule stating that it affords licensees a substantial competitive advantage by enabling them to offer both land and maritime radiotelephone and paging while UHF maritime carriers are precluded from entering adjacent DPLMRS markets. It suggests that a rule be adopted permitting UHF public coast carriers to provide land mobile one-way signalling and two-way radio service in adjacent on shore areas. In the alternative it requests that current Sections 22.509(b) and (c) not be deleted, especially the requirement that licensees terminate service to vessels when a UHF public coast station is inaugurated in the area involved.

178. We disagree with MCI and Kadison and we will not delete or modify subsections (a), (b) and (c). We believe they impose minimum safeguards which are necessary to protect mobile radio subscribers. We agree, however, with the comments proposing to eliminate prior Commission approval. We will add the terms suggested by AT&T to proposed subsection (c); we believe the terms provide helpful guidance and will not produce uncertainty. Concerning AT&T's proposal for a 10 percent airtime limit, we will not adopt it. We believe the provision of incidental services should be a business decision of a licensee in a competitive marketplace. We will not impose artificial constraints with an arbitrary percentage. As a collorary matter, in order to protect the primary purpose of our allocated frequencies and our objective of not permitting the quality of the licensee's authorized service to be diminished, we will not consider the airtime of incidental services for calculating channel occupancy pursuant to Sections 22.516 and 22.16. We agree with AT&T's comments that rural subscriber service should not be referred to as incidental services; we have therefore amended Section 22.509(b)(4) to delete the reference to incidental service from it. We disagree with Peters' comments concerning a definition for incidental services. We find that the proposed definition would only create controversy without actually defining the service.

179. We will not adopt MTC's proposal. We will permit incidental service to vessels and we will eliminate the prior subsections (b) and (c) of Section 22.509 (limiting service to vessels if a public coast station was authorized in the area). Any amendment to the rules concerning public coast stations is beyond the scope of this proceeding.

180. *Developmental Authorizations, Additional Application Content, Section 22.405.* We proposed to clarify this section and adopt a new rule dealing with renewals for developmental authorizations. The only party filing comments was AT&T. It requests that the rule be broader to allow for experimental market trials as part of a developmental service. AT&T states that this was allowed in the development of cellular service and provided a basis for determining public acceptability.

181. We do not agree with AT&T's proposal that the rules should routinely allow experimental market trials. Developmental service is, with few exceptions, non-commercial. Market trials have potentially significant competitive implications and, therefore, should only be authorized when adequately justified and approved by the Commission.

182. *"Secondary basis" paging service, Section 22.501(c).* We proposed to revise the rules to state that the frequency pairs listed in Section 22.501(c) are allocated for two-way mobile service but may also be used to provide one-way service if there is a public demand for such service, provided that two-way service is also offered. In so doing, we proposed to eliminate the "secondary basis" language in this subsection. We also proposed the same modification to Section 22.501(b) which makes similar allocations and includes the "secondary basis" language.[46]

183. The commenters filing jointly with Empire, as well as Peters, Zip-Call, AT&T and Telocator, generally support deletion of the "secondary basis" language. According to Empire, *et al.*, the proposed revision reflects the fact that marketplace forces already have determined the proper use of the frequencies at issue and Commission resources will be conserved by reducing wasteful, costly litigation. Zip-Call asserts that the secondary basis language has outlived its usefulness.

184. IMM was the only commenter disagreeing with the proposal. IMM asserts that the economics of paging, except in unusual circumstances, mandate that one-way service drive out two-way service, stunting the latter's development. In reply Empire claims that there is an absence of any evidence on this point. It argues that, since adoption of the secondary basis language in 1970, growth of two-way has not been impeded. Empire states further that the proposal does not amount to a reallocation of spectrum and will not result in inefficient spectrum use. Zip-Call asserts that perpetuating the secondary status of paging would constitute undesirable use of the Commission's regulatory powers.

185. FCBA, which reads the rule as requiring a carrier to "offer"

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[46] In accordance with policies established in CC Docket 80–189, note 2, *supra*, we have amended Section 22.501(a) by including precedures for grants of 43 MHz applications.

two-way on a "minimum" basis if the frequency is used for paging, requests clarification of the terms "minimal" and "offered". For example, if a licensee finds no demand for two-way, must it purchase the equipment anyway and include two-way rates in its tariff? Hill suggests that if the Commission does not intend to permit tacit conversion of two-way channels to paging service (which Hill counsels against), it should substitute the word "provided" for "offered." Hill believes the proposed language appears to contemplate merely that two-way service will be available only to those who ask specifically for it.

186. TDS suggests that if (as the NPRM implies) a licensee need not provide two-way service unless it has obligations to existing customers, the last clause of proposed Section 22.501(c), "provided that two-way service is offered", should be deleted. If such is not the Commission's intent, clarification of "offered" is needed. For example, if two-way service must be accommodated even absent current demand, how should applicants seeking additional channels provide for this fact in loading studies? If clarification is not possible, TDS believes that the one-way service should be permitted without restriction.

187. Telocator rejects any modification of the terminology. According to Telocator, while Hill appears concerned that the rule would require no minimum effort to provide two-way service, use of the word "provided" would do no more than require that two-way service be provided to a single subscriber. Empire and Telocator read the NPRM as proposing formal recognition of marketplace reality and current Commission practice; thus, the marketplace and prior Commission decisions may be expected to define the extent to which two-way must be "offered".[47]

188. AT&T supports deletion of the secondary basis language provided that the Commission assigns frequencies one at a time, rather that in pairs; requires carriers applying to use a two-way frequency for one-way signalling to make an extended co-channel interference study to two-way mobile systems; and requires carriers to show that existing one-way signaling allocations in the same frequency band are already assigned in the service area. Further, AT&T would limit the use of the frequencies for paging to those carriers or their affiliates which also offer two-way service or

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[47] Telocator also notes that the Communications Amendment Act (1982), prohibits providing "dispatch service" except by stations licensed prior to January 1, 1982, and requests, therefore, that the rule be revised accordingly. 47 USC § 331(c)(2). We agree with Telocator but we are amending Section 22.519 instead to provide that no new dispatch stations or dispatch points will be permitted. A common carrier which had authority to provide dispatch service prior to January 1, 1982, may continue to provide such service. Reference to dispatch stations and dispatch points in the rules, specifically, Sections 22.2, 22.509, 22.515 and 22.519 are applicable to grandfathered stations and the cellular radio service pursuant to Section 22.911.

cellular service. Telocator attacks this proposal as an unsupported attempt by AT&T to resurrect the company's suggestion, rejected in Docket 20907, to effectively reallocate two-way frequencies to one-way service on a primary basis.

189. Peters agrees that Section 22.501 should be revised but suggests that the word "wireline" be added to the definition of telephone company in Section 22.501(b) and to the language of Section 22.501(c) to distinguish cellular operators from carriers providing local exchange telephone service. As noted above, IMM disagrees with the proposed liberalization of restrictions on paging and argues that paging should be encouraged, but on frequencies specifically allocated for this use. IMM argues that the market's preference for paging reflects not so much demand *per se*, but rather demand for good low-cost mobile radio which current two-way systems cannot satisfy. Digital technology, however, soon will address this need and its development should not be impeded by a shortage of two-way channel capacity. Finally, IMM argues that any impetus for more efficient paging technology will be thwarted by this *de facto* allocation of additional paging frequencies.

190. Dean George Hill also expresses concern that two-way service may be denied to prospective subscribers in need of service. Furthermore, a question of efficient spectrum utilization arises if one half of the paired frequencies remain unused. Hill requests that if the Commission does not intend to permit conversion to paging exclusively, it substitute the word "provided" for "offered". In addition, Hill points to the plethora of paging frequencies currently available and urges adoption of some sort of reporting/relicensing procedure to ensure efficient spectrum utilization.

191. We agree with IMM that paging should be encouraged, but on frequencies specifically allocated for this use. We also agree with the commenters that paging on two-way channels has the potential to drive out two-way service stunting its development and thwarting the development of more efficient paging technologies. We agree with Hill that allowing one-way paging on two-way frequencies raises a question of spectrum efficiency in that one-half of a paired channel remains unused.

192. In our view, the extensive use of two-way channels for paging in urban areas has represented a marketplace response to the traditional shortage of paging channels. Until 1981, there were only eight. Currently, there are 76 frequencies allocated for paging (32 in the 35 and 43 MHz band, 4 in the 150 MHz band and 40 in the 900 MHz band) and 40 in reserve for advanced technology paging. In light of the number of paging frequencies now available, the public interest requires a more stringent approach. Use of two-way frequencies for paging constitutes inefficient use of the spectrum. While it is likely that most two-way service will be provided on cellular systems in the future, we would be remiss in permitting a *de*

facto reallocation of the 44 paired VHF and UHF channels to paging. Moreover, it is quite possible that conventional two-way service will continue to meet the needs of many users who do not want to pay the anticipated higher price for cellular service, who wish to continue to use existing equipment, or who wish to take advantage of new technology, as suggested by IMM. Accordingly, we will adopt the proposed requirement that carriers providing paging on two-way channels "offer" two-way service as well. By "offer", we mean that a carrier must have the capability of serving a two-way customer upon request. If a carrier has no interest in providing two-way service, we expect it to exchange its two-way channel for a paging channel so that new entrants, or incumbents who do want to offer conventional two-way service, are not foreclosed from the market. At some point it may well be desirable to consider reallocating the paired 150 and 450 MHz channels. We would then examine whether some or all of the channels should be used for common carrier paging or whether the public interest requires an entirely different allocation. For now, we will maintain the *status quo*.

193. *Waiver of Frequency Allocation, Section 22.501(n)*. We proposed to adopt a rule to establish standards for granting waivers of the separate allocation of frequencies to radio common carriers and wireline common carriers in present subsection (b), (c), and (h) ("the fence"). The proposed rule would establish criteria for waivers and the assignment of a wireline frequency to an RCC, or *vice versa*. We also requested comments on whether the waiver policy should apply during the 60-day cut-off period after an application is filed. We stated that the elimination of the separate allocation structure itself involves a major policy assessment which is beyond the scope of this proceeding. We also stated that we intended to undertake a review of the "fence" in a separate proceeding. The proposed waiver policy was limited to the 450 MHz band frequencies in Section 22.501(b) and (c) and the guardband frequencies listed in Section 22.501(h). We stated in the NPRM that for technical reasons the waiver policy would not apply to the 150 MHz band, because the WCC frequencies allocated in this band have different base and mobile channel separations than those allocated to the RCC's.

194. Peters, Kadison, TDS, Vega, IMM, RTC, AT&T, Telocator, Big Sandy, USITA, Cactus, and Message Center filed comments on the proposal. Empire, Telocator, MCI, Cactus and TDS filed reply comments.

195. Some of the comments supported the waiver policy but differed on its application. For instance Peters, Telocator and others supported revisiting the *Bonduel* policy[48] and limit the fence to

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[48] Bonduel Telephone Co., 68 FCC 2d 497 (1978). Under this policy, a wireline or its affiliate or subsidiary may apply for wireline frequencies in any market regardless of where it does business as a telephone company.

locations where the wireline companies provide local exchange telephone service. The comments also differed on the applicability of the waiver policy during the 60-day cut-off period. AT&T stated that applying the waiver during the cut-off period would be a giant step toward eliminating the fence, which is a decision the Commission stated is beyond the scope of this proceeding. TDS generally objected to the waiver policy. MCI, Peters and Kadison requested that the waiver policy include the 150 MHz frequencies; also, they suggested that the incompatibility explanation in the NPRM failed to recognize modern technologies.

196. After reviewing the comments, we have decided not to adopt the proposed rule. Instead, we will issue a Notice of Proposed Rulemaking as a companion item to this Report and Order, asking for comments on the elimination of the separate allocation or fence. *See Notice of Proposed Rulemaking*, FCC 83–477, CC Docket 83–1146, released December 12, 1983. This proposal encompasses all the frequencies in Sections 22.501(b), (c), (h), (i) and (j). As discussed below, we will establish the policies here to govern waivers until the conclusion of this new rulemaking proceeding concerning the elimination of the fence.

197. As stated in the accompanying *Notice*, the fence was adopted to foster a competitive environment by providing separate frequencies within which companies which did not provide local exchange telephone service (RCC's) could develop. There is today strong competition between RCC's and WCC's. The Commission's purposes in fostering this competition have been met. We tentatively believe that today no useful purpose is served by keeping the fence in place. Therefore, instead of adopting the proposed limited waiver policy, we are proposing to eliminate the fence.

198. As a result of our decision here we are hereby disposing of a Petition for Interim Relief and Objection to Grant of Applications, filed on October 26, 1982 by Telocator and a Petition for Reconsideration filed by Telocator on December 17, 1982. In the Petition for Interim Relief in this proceeding Telocator requested that the proposed waiver policy be adopted pending the conclusion of this rulemaking. Telocator's request was limited to the guardband paging frequencies in Section 22.501(h)(1). Telocator also requested that an additional 60 day cut-off period be established and applications be accepted for filing which would be mutually exclusive with applications filed by American Paging Inc. (API), a subsidiary of TDS. The API applications referenced by Telocator were filed between January and October 1982.[49] Telocator petitioned for reconsideration of the grant of two API applications on November 17, 1982, based on

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[49] API filed an Opposition to this Petition. Dean George Hill also filed comments opposing the Petition for Interim Relief. Omni Communications, Inc. (Omni) filed commens in support of Telocator's proposal. Replies to the opposition were filed by Telocator and Omni.

the fact that the two applications had been granted after its Petition for Interim Relief was filed. API filed an Opposition.[50]

199. As we stated before, in this proceeding we proposed a limited waiver policy of the separate frequency allocation. Our proposal did not apply to the cellular service which also has a fence. Further, our proposal had prospective effects and we did not in any way intimate that we would adopt the proposal on an interim basis pending the conclusion of the rulemaking. Since we are now proposing to eliminate the fence, we will grant in part Telocator's Petition for Interim Relief, limited to the following: (a) Wireline applications filed *before* the adoption of the NPRM in this proceeding, or July 29, 1982, will be granted under pre-existing standards, provided they otherwise comply with our rules. (b) All wireline applications filed *after* July 29, 1982, which are not mutually exclusive will be granted. (c) Wireline applications filed *after* July 29, 1982, which are, as of the date of adoption of this Report and Order, mutually exclusive with applications filed by RCC's requesting waiver of the separate allocation will be held in abeyance until the new proceeding on elimination of the fence is terminated. We are not extending the cut-off date for these applications as requested by Telocator. (d) RCC applications filed *after* July 29, 1982, requesting wireline frequencies and a waiver which are not mutually exclusive with other applications will also be held in abeyance as described in the preceding sentence. However, if during the pendency of the new rulemaking proceeding the prescribed 60 day cut-off period for any of these applications has not expired, we will allow applicants to file mutually exclusive applications. During the pendency of the new rulemaking proceeding and after its release date, we will allow RCC's to file for WCC frequencies and *vice versa*. Our normal cut-off procedures will apply. The channel loading standards will also apply. Our policy of granting one initial channel per market for paging frequencies and our policy that an application for a 900 MHz frequency amends a pending application for a paging channel on any other frequency, will also apply. Likewise, an application for a paging frequency filed subsequent to a pending 900 MHz application amends the 900 MHz paging application. As a result of our decision here, Telocator's Petition for Reconsideration will be denied to the extent it referred to applications filed before July 29, 1982.

200. We believe these procedures effectively safeguard the public interest and prevent the possibility that elimination of the fence will *de facto* be irrelevant because all frequencies will have been assigned in the interim. In order that service to the public not be delayed an inordinate amount of time we will expedite our disposition of the

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[50] Various RCC's have filed applications requesting waivers of the separate allocation since the adoption of the NPRM in this proceeding, some of these applications have been opposed and all are pending Commission action.

rulemaking concerning elimination of the separate allocation. We emphasize that the interim policies we are adopting here in no way indicate that we have decided the merits of the new rulemaking. They are specifically designed to permit the return of the applications to the *status quo ante* should we decide against eliminating the fence.

201. *Classification of base stations, Sections 22.502 and 503.* We proposed to rewrite Section 22.502, clarifying that stations using antennas higher than 500 feet will be designated Class A. We did not propose any changes to Section 22.503, which provides geographical separations for co-channel stations. Peters filed comments on these two sections suggesting that both sections serve no purpose and should be deleted, especially in light of Section 22.15(b), which prescribes the method of determining interference to co-channel stations. MCI in comments also states that the separation tables in Section 22.503 should be deleted. Hill had similar comments stating that Section 22.503 could be refined by adding minimum distances and eliminating the charts. Hill states that at 500 feet/500 watts, the minimum separation on either a 150 or 35–43 MHz channel to be interference free is 68 miles.

202. We disagree with the comments. Maintaining these two sections is necessary to assure interference-free service areas, and the sections do not create unnecessary burdens for applicants. However, we have revised the sections somewhat in line with our revisions to Section 22.15.

203. *Service area of base stations, Section 22.504.* The only change proposed to this rule was changing the title and the word "reliably" to reliability. The only one commenting on the rule was Comp Comm. It suggests including in the rule several standardization procedures addressed by the Mobile Services Advisory Committee. Comp Comm states that the present propagation tables of Section 22.504(b) do not include distances from base stations of fewer than 5 miles and in the interest of standardization, it is essential that the FCC staff propose extended propagation curves that contain values both below 5 miles and also at greater distances than presently shown. It argues that extensions are necessary so that all engineering submissions use the same basic curves over the entire range.

204. We believe that Comp Comm's suggestion has some merit. Nevertheless, adopting the changes suggested would involve conclusory determinations on our part, because we do not have sufficient data on the record to support the adoption of the proposal.

205. *Antenna height-power limit, Section 22.505.* We clarified this section and excluded air-to-ground radio stations because this section was not applicable to them. Peters suggested that we replace the curve in subsection (a) with an equivalent tabular or mathematical form like the one for 900 MHz stations in subsection (b). Peters

states that this is easier, less ambiguous and more amenable to computerization. We concur with Peters and we have added a table to subsection (a) and removed the current chart.

206. *Bandwidth and emission limitation, Section 22.507.* We did not propose any changes for this section. However, Wulfsberg suggested adding "F9" emissions for automatic signaling to the table describing types of emissions. Wulfsberg suggested adding "F9" at the bottom of the column headed "Type of Emission and adding the figure "20" under authorized bandwidth and the figure "5" under frequency deviation at the bottom of the column headed "150–512". We agree and have amended the section accordingly. *See* paragraph 126, *supra.*[51]

207. *Permissible Communications, Section 22.509.* We proposed to clarify this rule and reorganize the subsections. We also requested comments on whether the policy on taxi cab operations and dispatch service should be modified. We especially questioned whether the prohibition on taxi cab service should be eliminated and left to the business judgment of the carrier. We also questioned whether the Commission should eliminate the policy that a dispatch station operator may communicate only with its own associated mobile units.

208. Peters and Telocator suggested that we eliminate subsection (c), dispatch stations, and subsection (f), taxi dispatch. Peters states that this should be left to the licensee's discretion. Telocator again cites the Communications Amendment Act and proposes that the prohibitions of the Act be codified in Section 22.501(a)(1), (b) and (c).[52] As mentioned in our discussion of incidental services, Section 22.308, AT&T suggested that service to vessels and rural subscriber stations not be treated as incidental services. MTC requested that current subsections (b) and (c) dealing with service to vessels be retained.

209. We will not adopt Peters' and Telocator's comments. We

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[51] We have also modified Section 22.508(d) and (e) to conform to changes we have made in other rules.

[52] We are treating as an informal comment a Petition for Rulemaking filed by Fairmount Telephone Company, Inc. on November 3, 1982, requesting uniform nationwide service rules governing roamer/transient land mobile stations. It requests a revision creating a strong presumption in favor of a roamer's right to service through "foreign" base stations and imposing a strict burden on the foreign base station operator who may not want to serve roamers. Fairmount asserts that the current rules are ambiguous and that some foreign base station operators engage in unjust, unreasonable and discriminatory practices against roamers, cutting-off or impairing service to them. We received a motion to dismiss the petition filed by AT&T. Fairmount's request obviously arose from a controversy between Fairmount and AT&T involving roamers, which the Common Carrier Bureau resolved in AT&T's favor. Fairmount Telephone Co. v. Southern Bell Telephone & Telegraph Co. and American Telephone & Telegraph Co., File No. E-83-2, CC Mimeo 2678, released March 2, 1983. In any case, the question of roamer-access is beyond the scope of this proceeding.

will retain proposed subsections (c) and (f). However, subsection (c) will make reference to Section 22.519, which we have amended pursuant to the Communications Amendments Act of 1982. We agree with AT&T concerning rural subscriber stations. *See* discussion of Section 22.308.

210. *Additional showing requirement, Section 22.516.* We proposed to conform this rule to our present requirements, replacing the term "holding time" with "channel occupancy time", and requiring traffic load studies for only the busiest one hour. Peters, Kadison, Vega, FCBA, Telocator, USITA and TDS filed comments on the proposal.

211. Peters suggests that the licensee be required to survey the entire day (8 - 12 hours) but only be required to report the single busiest hour for each of those days. USITA had the same comment. Peters, Kadison, FCBA, Telocator and TDS also filed other comments which we have addressed in the *Third Report and Order* in CC Docket No. 20870, FCC 83–53, where we adopted a new Section 22.16, "*Objective Need Standards*"; therefore we will not address these comments. See also, *Further Notice of Proposed Rulemaking*, FCC 83–38, released February 14, 1983, CC Docket No. 20870. Vega also suggested there is an inconsistency in the proposed rule in subsection (c) because it states that an applicant must report separately for each hour; however, in the discussion preceding the rule, we stated that we would ask only for the single busiest hour of the day.

212. We have revised the proposed rule to clarify it further. In conformance with our decision in Docket No. 20870, the rule will state that the survey must report separately the channel occupancy for the busiest hour on each of the three days and that the study shall survey traffic on each channel assignment for three days in a seven day period having normal usage.

213. *Air-ground radiotelephone service, Section 22.521.* We proposed to combine all sections dealing with this service into this section. Flight Inc. and Wulfsberg filed comments requesting that a rulemaking petition filed on January 22, 1980 by Wulfsberg be considered in this proceeding. Wulfsberg requests that frequency 459.675 MHz be assigned as an automated signaling channel in communications by and with airborne stations. We will not adopt the commenter's proposal. The request is beyond the scope of this proceeding since it entails the reallocation of the frequency for the requested purpose. However, we expect to take action separately on the rulemaking petition in the near future.

214. *Rural radio, Eligibility and Frequencies, Sections 22.600 and 601.* We proposed to eliminate the licensing of certain subscriber stations in an effort to reduce administrative burdens, and we also proposed to clarify Section 22.601. IMM commented on the proposal. IMM suggests that section 22.601(a) (Frequencies) be redrafted to eliminate the term "on a secondary basis" in reference to rural

radio, thus placing rural radio on an equal footing with mobile radio. It asserts that this would not disadvantage mobile users, and would benefit rural subscribers. IMM also requests clarification of the rule in terms of whether an RCC can offer full-fledged rural radio service as opposed to acting as an agent or intermediary between the subscriber and the wireline carrier. It states the rules should permit an RCC to provide the full-fledged service. It supports the elimination of the individual licensing requirements for subscriber stations which do not exceed 60 watts ERP. Also, IMM requested that the requirement that rural radio subscribers use directionalized antennas be eliminated.

215. As to IMM's recommendation that we eliminate the term "secondary basis", we cannot agree. Rural radio is a fixed operation which does not have its own frequencies specifically allocated. If rural radio were elevated to primary status, it is likely that mobile subscribers in areas with high rural radio usage would be deprived of service. As to the request for clarification, our rules only allow an RCC to communicate with a rural subscriber station through its base station in specified cases. *See* Sections 22.600 *et seq*. In this service the frequencies are intended primarily for use in rendering public message service between Rural Subscriber and Central Office stations and to provide radio trunking facilities between central offices. Central office and interoffice station frequencies are allocated only to wireline carriers. RCC's are permitted to use subscriber station facilities which operate through the RCC base station, where the use of wirelines is not practicable or feasible (where the establishment of central office station facilities is shown to be impracticable) and upon a showing that it will not degrade the mobile communication service rendered by the base station. Rural subscriber stations are normally authorized to communicate with and through the central office station with which they are associated. A change from this procedure is not within the scope of this rulemaking. We will not adopt IMM's suggestion that we eliminate the requirement that rural subscribers use directionalized antennas. Our rules provide that stations which communicate with one point must use directional antennas. We believe that allowing the use of omnidirectional antennas would increase interference potential to mobile systems. We have also made minor editorial corrections to the rule concerning meteor burst communications § 22.601(b) adopted in *Meteor Burst Communications*, Docket 82–694, FCC 83–348, released July 22, 1983.

216. *Forms*. We proposed to revise Form 401, and to adopt new Forms 489 and 490. Almost all of the commenters suggested revisions to these forms.

217. Peters, among other things, suggests cross-referencing to Form 430 (Qualifications Report), items 20 - 30 on proposed Form 401, and deleting the requirement of an exhibit for major environ-

mental actions. Kadison also suggested corrections or clarifications to Forms 401 and 490 and suggested adding a check-off box for an applicant to state it has received reasonable assurance of antenna site availability. Vega commented on Forms 401 and 489, suggesting that the Forms could be shortened with required items being referenced by exhibits rather than filling in blanks. Vega also suggested deleting the items dealing with control point information from Form 401 and making them part of Form 489. TDS concurred with this proposal. TDS also suggested that the Commission make available to the public the data base so applicants can periodically check to see if the information concerning Form 489 has been entered.

218. Comp Comm suggested that Form 489 should be accompanied by a detailed engineering study showing that co-channel interference information originally submitted on Form 401 is not adversely affected by corrections or changes to the facilities and that the filing of FCC Form 489 should be listed on public notice. It also suggested requiring an amended Form 489 to be filed for any power reductions and equipment substitutions. Comp Comm disagreed with the requirement that the FAA study be included with Form 401.

219. AT&T included a proposed Form 401 in its comments. Telocator concurred with AT&T's proposed Form 401 and recommended some changes to it. Telocator also suggested some revisions and asked for clarification of certain items of the Forms. All Florida suggested that applicants for multiple sites provide site-by-site information on separate exhibits and also recommended the deletion of certain items and various corrections to Form 489. USITA suggested a shorter Form 489 could be adopted as a simple notification of readiness for service.

220. Peters and Offshore also suggested that the Commission should accept substantively-equivalent computer prepared Form 401's provided they satisfy the following: (a) printed on 8.5 x 11 paper; (b) contain the same text as Form 401; and (c) are intended to have the same effect as the Form 401. In addition, it was suggested that the Commission revise the Form 401 to a format that could be easy to duplicate by computer. They both state that much time and expense can be saved for applicants by allowing this.

221. The comments also contained the following suggestions concerning the forms: (1) that the profile sketch be filed as a separate Exhibit and not integral to a Form item; (2) that the applicant certify that it is the real party in interest; and (3) that the applicant has made no agreement to transfer or assign the license at a later date. They also point out that the reference to satellite earth station in Form 401 should be deleted.[53] The comments also suggested that

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[53] The existing Form 401 is used by applicants under Part 25, as well as Part 22, of the rules.

items 6–9 dealing with whether the station has been completed should be deleted from Form 489, since they are repetitious of Form 701, and that a check-off box for major environmental actions should be included in Form 401.

222. We have reviewed the comments concerning the proposed forms. We have followed some of the recommendations. Others we have not followed for various reasons, including either increased administrative burdens or increased reporting requirements for applicants.

223. We disagree with Peters and we will not cross-reference to Form 430. We believe applicants should fill out the required information with every Form 401 they file.[54] It is not particularly burdensome, but it does help us fulfill the ownership and citizenship requirements of the Act. A principal reason we have for maintaining the legal and ownership items is that the Commission is currently studying the possibility of eliminating Form 430, *Notice of Proposed Rulemaking*, 47 Fed. Reg. 5732, Feb. 8, 1982. In light of this we will continue to require this information on Form 401.

224. We have added an item to the Form 401 concerning major environmental actions; applicants may check a box to indicate whether the proposal is major or not pursuant to Section 1.1311 of the rules. We have also added a check off box for applicants to certify that they have received reasonable assurance of site availability. See discussion of Section 22.15.

225. We have modified proposed Form 489. It will also be used to request extensions of time to complete construction, minor modifications to existing facilities, and reinstatement of authorizations. We have changed the title of this form to Notification of Status of Facilities. Therefore, we will eliminate Form 701 (Requests for Extensions of Construction Permits). This simplifies procedures and eliminates another Form. We disagree with TDS' comments that all Forms 489 should be placed on public notice. This is an additional administrative burden, which we discussed above. The Form 489 will be used *inter alia*, for minor modifications of the authorization and we have limited and specified these changes; thus, we see no need to increase burdens by placing all the filings on public notice. Those changes that we deem of public importance in a Form 489 will go on Public Notice. Concerning TDS' related request that we make available the data base to the public, the Commission is currently examining this request in another proceeding. *Allowing the Public Direct Remote Access to Commission Computer Data Bases, Notice of Inquiry*, FCC 83–217, released May 20, 1983. We will keep the items dealing with control points on Form 401, and on Form 489 applicants will notify of any changes of the control point. We are not requiring that a copy of the FAA studies be attached to the Form 401; however,

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[54] An applicant may attach a current copy of its Form 430 to its Form 401.

if the applicant has received the FAA determination it should include a copy of this. If the determination is not available, the applicant should indicate the date and regional office where the FAA filing was made.

226. We have adopted the suggestion that applicants for multiple sites provide site-by-site information on separate exhibits. We believe this will make the Form easier to fill out and will facilitate application processing.

227. We agree with the recommendation that we accept substantively equivalent computer generated Form 401's. We believe this reduces costs for applicants and facilitates their application preparation. In order not to increase burdens for our staff, we do request applicants to submit their proposed computer-generated forms for informal staff review before using them in formal applications.

228. We do not agree with the recommendation that we include in the applicant's certification that there has been no agreement made to transfer or assign the license at a later date. Section 22.309 provides that the filing of an application shall be a representation by the applicant that the motivation for the application is the applicant's intention to provide service to the public. We believe this is sufficient.

229. We will not adopt the recommendation that the antenna sketch be a separate exhibit and not an integral Form item. Keeping the antenna sketch an integral Form item facilitates preparation of applications by the public and processing by the staff.

Regulatory Flexibility Act - Final Analysis

230. *Need for Rules and Objective.* We have eliminated unnecessary forms, information gathering and regulatory burdens whenever possible in the public mobile radio service. We have streamlined the administrative process affecting these licensees and permitted self-regulation whenever possible. Our objective is to eliminate unnecessary regulations and policies and to provide service to the public in the most efficient, expeditious manner possible.

231. *Issues Raised by the Public In Response to the Initial Analysis.* We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments and whenever possible, we have modified our proposals.

232. *Alternatives that would lessen impact.* We have reduced burdens whenever possible, some we had to retain in order to carry out our duties under the Communications Act. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

Ordering Clauses

233. Authority for this rulemaking is contained in Section 4(i)

and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), 303(4), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

234. Accordingly, IT IS ORDERED, That Part 22 of the Commission's Rules and Regulations is amended as specified in Appendix B, effective 30 days after publication in the Federal Register.

235. IT IS FURTHER ORDERED, that FCC Forms 401, 403, 701, 702, 704 and 714 are superseded by new FCC Forms 401, 489 and 490, as set forth in Appendix B, subject to review by the Office of Management and Budget.[55]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendices A&B-may be seen in FCC Dockets Branch, Room #239 or at *49* FR *3292*

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[55] Tentative copies of FCC Forms 401, 489 and 490 are appended to this Report and Order. These forms are not to be used until they have received the approval of the Office of Management and Budget. A Public Notice will be issued when the new forms have been approved and are available for use. Until that time, the existing forms 401, 403, 701, 702, 704 and 714, should be used.

Domestic Public Land Mobile Service
Rural Radio Service

Commission proposes to eliminate the separate allocation structure of Sections 22.501(b), (c), (h), (i) and (j) in the Public Land Mobile Service and allow all carriers to apply for the frequencies currently allocated separately to wireline and nonwireline carriers. Revision of certain rule sections in the Rural Radio Service are also proposed.
–Public Land Mobile Service
CC Docket No. 83-1146

FCC 83–477

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Elimination of the Separate Frequency Allocation Structure in the (Public Land Mobile Service (Rules Section 22.501)	CC Docket No. 83–1146

NOTICE OF PROPOSED RULEMAKING

(Adopted: October 19, 1983 Released: December 12, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

Introduction

1. The Commission hereby proposes to amend Part 22 of the Commission's rules to eliminate the separate frequency allocation structure presently set forth in Sections 22.501(b), (c), (h), (i), and (j) (47 U.S.C. §22.501), governing the Public Land Mobile Service (PLMS).[1] Under our present rules, frequencies in the 150 MHz and 450 MHz bands are allocated separately for use by wireline and nonwireline carriers. This separate allocation is commonly referred to as a "fence" between wireline and nonwireline frequencies. In CC Docket No. 80-57, we had proposed a limited waiver to this separate allocation scheme. *See Notice of Proposed Rulemaking (NPRM)*, 47 Fed. Reg. 43842, 43876 (1982) ["§22.501(n) Waiver of frequency allocation"]. In the *NPRM* we stated that a full reexamination of the separate allocation was beyond the scope of that proceeding and

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[1] Subsection 22.501(j) is being combined into 22.501(i) in the companion Report and Order in CC Docket 80-57. The separate allocation structure also appears in Section 22.601(a), regarding the Rural Radio Service, which is operated on a secondary basis on certain specified Public Land Mobile Service frequencies.

requested comments only on the waiver policy which would permit nonwireline and wireline carriers to request a waiver to file applications for the other block of frequencies. The comments filed by the public on the proposed waiver policy were extensive and divided between those supporting and those opposing such a waiver. After reviewing these comments, we have concluded that the central issue behind the waiver policy is the separate allocation itself. Therefore, we have decided that, rather than adopt the waiver proposal, we should initiate a separate proceeding to eliminate the fence.[2]

Background

2. The separate allocation was first implemented in 1949, in the *General Mobile Radio Service* proceeding, *Report and Order*, 13 FCC 1190, *recon. denied*, 13 FCC 1242 (1949). In the *Report and Order* the Commission stated, 13 FCC at 1218:

> The Commission has, in the disposition of this docket and the related proceedings, made provision for . . . the development of competitive communications common carrier systems . . . [W]e have taken particular care to provide a family of frequencies within which the development of common carrier mobile radio systems by enterprises other than existing telephone companies may take place. These dispositions have been effected advisedly, and with the purpose among others, of fostering the development of competing systems, technologies, and equipments.

3. Thereafter, the Commission again underscored its commitment to fostering wireline-nonwireline competition in the public mobile radio service in 1963 in *ITT Mobile Telephone, Inc.*:[3]

> Our stated purpose of fostering the development of competing systems, techniques and equipment has, in the light of experience since 1949, proved to be salutory and no justification has been made for reversal of the basic policy determination originally made at that time.

4. In 1967 the Commission proposed in Docket No. 16778 to make additional frequencies available under the separate allocation structure. *Allocation of Frequencies in 150.8–162 Mc/s Band*, 9 FCC 2d 659 (1967).[4] In proposing to make these "guardband frequencies" available, the Commission further discussed the "fence" allocation. In that Notice, the Commission sought comment on "What effect, if any, would such assignment have on the ability of nonwireline

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[2] In the *Report and Order* in CC Docket No. 80-57, FCC 83476, which we are adopting today, we set forth the procedures for acting on applications filed for the frequencies pending completion of this proceeding. *See* Report and Order at paras. 199 and 200.

[3] 1 RR 2d 957, 963.

[4] Under the Commission's proposal, the frequencies 152.84 and 158.10 MHz were allocated to wireline common carriers. The frequencies 152.24 and 158.70 MHz were allocated to nonwireline common carriers.

carriers to compete with wireline carriers in the provision of one-way service?" *Id.* at 664.

5. In the *Report and Order* [5] making these guardband frequencies available, the Commission repeated its concern for the ability of nonwireline carriers to compete effectively with the wireline carriers and imposed several requirements:

> (a) In order to ensure that all technological advances should be made equally available to the nonwireline and/or wireline carriers, all telephone companies are required to make available, upon request, dial access interconnection to the nonwireline carriers in any community where such a method of operation is being used by wireline carriers.
>
> (b) Any wireline carrier is required to fix its charges to RCC's for wireline facilities on the identical basis which the wireline carrier uses to compute its own costs in connection with any one-way signaling service it offers.
>
> (c) If a wireline carrier offers free toll service in connection with paging service, the carrier must make available the same toll free facilities to the RCC free of charge so that the RCC may also supply the same toll free service.
>
> (d) Nonwireline carriers may, under §309(d)(1) of the Communications Act, petition the Commission to deny a wireline paging application if the RCC believes that only one such service is viable and that the wireline carrier could obtain a competitively advantageous headstart in the market involved. *Id.* at 846–851.

6. In 1968, in its denial of reconsideration of the guardband allocation, the Commission noted that competition was growing between telephone companies and the other carriers:

> Eleven of the top 40 cities are now being served by telephone companies and 36 of the top 40 are being served by MCC's (also known as RCCs). The telephone companies and the MCC's compete in 13 of these cities - 11 with Bell Systems and two with independent telephone companies. Of the 170 one-way signaling stations authorized nationwide, 25 are Bell operations; nine independents; and 136 MCC's.[6]

7. The Commission's guardband allocation was upheld on appeal in *Radio Relay Corporation v. F.C.C.*, 409 F.2d 322 (1969). Since then other decisions have had an impact on wireline-nonwireline competition. For instance, in *Bonduel Telephone Co.*, 68 FCC 2d 497 (1978), we permitted wireline companies to apply for wireline paging frequencies in any market, without regard to where they are doing business as a wireline. We have also allocated frequencies without following the separate allocation structure. For instance, in the *900 MHz Proceeding, First Report and Order*, 89 FCC 2d 1337 (1982), we stated, at para. 22:

> "In the past, the allocation scheme for paging frequencies, other than in the 150 MHz band for common carrier paging frequencies, has not included separate, exclusive allocations. The separate allocations scheme adopted in 1949 for the

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[5] 12 FCC 2d 841 (1968).

[6] 14 FCC 2d 269, 271 (1968).

> 150 MHz paging frequencies and the two-way frequencies was originally intended to foster the development of competing systems, techniques and equipment. It now appears, however, that while such goals remain valid and desirable, this regulatory constraint is no longer necessary for achieving our goals in a mature Domestic Public Land Mobile Radio Service industry. We conclude that a single allocation approach, in combination with the availability of a relatively large number of paging frequencies, our proposed assignment policies and our loading standards, will more likely allow for a market-driven development of competing service offerings than will a rigid, separate allocation scheme (footnotes omitted)."

We thus adopted an allocation plan that provides for one block of 900 MHz frequencies to be made available to both wireline carriers and RCCs on an equal basis. The 35–43 MHz paging frequencies even from the beginning were not fenced. *One-Way Signaling in the 35 MHz and 43 MHz bands*, *Report and Order*, 77 FCC 2d 384 (1981).[7]

Tentative Findings

8. Wireline-nonwireline competition has developed within the context of the policies discussed above. The Commission's licensing records as of May 1983, show the following usage on the fenced frequencies.[8]

Frequencies by rule section	*Wireline Stations pending*	*authorized*	*Nonwireline Stations pending*	*authorized*
§ 22.501(b) (150 MHz band)	98	3,001		
§ 22.501(c) (150 MHz band)			551	4,167
§ 22.501(b) (450 MHz band)	29	565		
§ 22.501(c) (450 MHz band)			566	2,960

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[7] In the Cellular Service we adopted a separate allocation but limited it to a two year duration. The separate allocation was adopted because the Commission found that the fence constituted the most practical, and quite possibly the only, way to achieve the Commission's twin goals of making quality mobile telephone service available to the public as rapidly as possible while promoting competition whenever feasible. We also determined not to apply the *Bonduel* policy *supra*, to cellular carriers; thus wireline companies can only apply for authority for cellular service in the same general area in which they operate as a landline carrier. *See* 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), appeal dismissed sub nom. U.S. v. FCC, Cir. No. 82–1526 (D.C. Cir., March 3, 1983).

[8] Figures derived from the Commission's staff study of frequency usage.

§ 22.501(h)(1) (guardband freqs.)	251	768		
§ 22.501(h)(2) (guardband freqs.			290	1,883
TOTAL	378	4,334	1,407	9,010

Total wireline stations authorized or requested: 4,712
Total nonwireline stations authorized or requested: 10,417

9. The above figures clearly show that the RCCs are no longer a fledgling industry in need of regulatory safeguards whose purpose is to foster competition. Robust competition is now a reality between RCCs and wireline carriers. Nonwireline companies have far more authorizations and applications pending than do their wireline counterparts. Moreover, in a significant number of markets the nonwireline frequencies are completely used, whereas some wireline frequencies remain unused. The chart below surveys the number of channels authorized on the separately allocated frequencies in 25 markets.[9]

SURVEY OF TWO-WAY CHANNEL UTILIZATION IN 25 MARKETS

	NUMBER OF CHANNELS LICENSED OR PENDING		*PERCENT OF AVAILABLE CHANNELS ASSIGNED*	
	Non-Wireline	*Wireline*	*Non-Wireline*	*Wireline*
NY City & Northeastern, NJ	21	23	100	100
Los Angeles, CA	21	23	100	100
Chicago & Northwestern, IN	21	23	100	100
St. Louis, MO	19	21	90	91
Milwaukee, WI	21	15	100	65
Houston, TX	21	21	100	91
Seattle, WA	21	23	100	100
Miami, FL	21	23	100	100
Denver, CO	21	23	100	100
San Antonio, TX	21	15	100	65
San Jose, CA	20	23	95	100
Phoenix, AZ	21	23	100	100
Springfield, MA	21	11	100	48
Oklahoma City, OK	21	22	100	96
San Bernardino, CA	20	15	95	65
Salt Lake City, UT	21	10	100	43
Syracuse, NY	15	11	71	48
Tampa, FL	21	23	100	100

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[9] This table is based on a staff study compiled as of May 1982, and includes the fence frequencies listed in §§22.501(b) and (c).

	Non-Wireline	*Wireline*	*Non-Wireline*	*Wireline*
New Haven, CT	21	16	100	70
Mobile, AL	17	9	81	37
Albuquerque, NM	16	6	76	26
Spokane, WA	20	6	95	26
Canton, OH	21	12	100	52
Charlotte, NC	21	16	100	70
Shreveport, LA	16	13	16	57
AVERAGE NO. OF CHANNELS	20.0 (out of 21)	17.0 (out of 23)	95%	74%

10. The above figures demonstrate a significant difference in the level of usage on the two sides of the fence, with a near-saturation level of use by nonwirelines. It is reasonable to infer that, if the fence were removed, nonwireline carriers in a saturated market would apply for, and serve the public on, the unused wireline frequencies.[10]

11. The separate allocation assisted the RCCs in competing with the WCCs, at a time when there were few if any common carrier mobile systems other than existing telephone companies. Our analysis of the market demonstrates that the separate allocation we first imposed in 1949 has served its purpose well. Today the RCCs have a strong presence in the DPLMRS industry. They are firmly established businesses with significant market shares and they compete effectively with wireline companies. There are evolving technologies in the mobile services. The market for mobile service is competitive, encourages innovation, provides efficient service and permits users to make decisions according to price and quality of service. Therefore, the artificial constraint we imposed beginning in 1949 appears to have outlived its usefulness. Today, it only serves to reserve, in markets where there is 100% channel utilization by the RCCs, a block of frequencies for the WCCs, detering the RCCs from competing for these frequencies. Accordingly, we tentatively conclude that retention of the fence in today's marketplace is not in the public interest and is prejudicial to the RCCs by limiting their ability to expand their systems. In addition, it insulates the WCCs from competition, and we see no valid reasons for this. The removal of this market constraint will serve the public interest by permitting additional competition, creating more service to the public and possibly reducing the cost for customers.[11]

12. It was argued in the comments in CC Docket 80–57, *supra*, that today the circumstances are reversed and some wirelines may now need this protection because there are some RCCs that are

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[10] See companion item *Report and Order* at paras. 193–200.

[11] Id. at para. 107 where we decided not to include the guardband paging channels in Section 22.40 of the rules until we determine whether to abolish the fence.

stronger and have more resources available than their wireline counterparts. The wireline companies have also argued that the wireline block of frequencies in some markets are unused because it was not until recently that the WCCs were able to apply for frequencies in markets other than their franchised areas, *Bonduel, supra*. We reject those arguments. It was the WCCs' business decision not to apply for these frequencies. The *Bonduel* case was decided 7 years ago and the WCCs still have not utilized the frequencies as heavily as the RCCs. Moreover, the purpose of the rule was to spawn RCC competition. Having served this limited purpose by generating a healthy level of market activity, the rule no longer has a place in the current environment, and we foresee clear public benefits from its elimination.[12]

13. *Rural Radio Service*. In proposing to eliminate the separate allocation structure, we are mindful of the possible impact that this change in allocation might have on the Rural Radio Service. The Rural Radio Service presently uses on a secondary basis, the same frequencies as does the PLMS. In this service the frequencies are intended primarily for use in rendering public message service between Rural Subscriber and Central Office stations and to provide radio trunking facilities between central offices. Central office and interoffice station frequencies are allocated only to wireline carriers. RCC's are permitted to use subscriber station facilities which operate through the RCC base station, where the use of wirelines is not practicable or feasible (where the establishment of central office stations facilities is shown to be impracticable) and upon a showing that it will not degrade the mobile communication service rendered by the base station. Rural subscriber stations are normally authorized to communicate with and through the central office station with which they are associated. To the extent that RCCs, for example, are assigned wireline frequencies on which Rural Radio Service is currently being offered, mobile service congestion on the channel could degrade or jeopardize the quality of the Rural Radio Service. Additionally, we do not wish, in eliminating the fence, to preclude the possibility of responding to future needs for Rural Radio Service. Because of these concerns, we propose that existing Rural Radio systems be grandfathered to operate on a primary basis rather than secondary as the rules now provide. In so doing we treat rural radio on an equal footing with the land mobile service and guarantee

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[12] While it is likely that most two-way service will be provided on cellular systems in the future, it is quite possible that conventional two way service will continue to meet the needs of some groups of users. Furthermore, new technologies, such as digital voice transmission and single-sideband, may be developed using the conventional frequencies to complement or provide alternatives to cellular service. Accordingly, we believe that elimination of the fence may well foster innovation in conventional two-way systems.

that rural subscribers in areas with increasing mobile service usage will not be deprived of service.[13] Future applications for Rural Radio systems will be granted to operate only on a secondary, noninterference basis. To encourage RCCs to serve rural subscribers, Section 22.601 would be amended to permit RCCs to construct and operate central office stations. In addition, in order to protect the future needs of the public for rural radio service, we propose to require those RCCs who utilize prior wireline frequencies to provide rural radio service where requested in addition to any other service they may provide. Our proposed changes should alleviate concerns that Rural Radio service will be "bumped" by elimination of the fence.

14. From an administrative standpoint, the change involves more detailed filings from Rural Radio applicants. We would require these applicants to submit a frequency search of all co-channel stations within the radius specified in Section 22.15(b) from the proposed base/central office/subscriber/interoffice/relay station, including information concerning height above average terrain and effective radiated power. *See* Sections 22.15(b), 22.115, 22.505 and 22.506. Additionally, applicants would be required to submit an interference-free showing for the proposed station. *See* Section 22.15. We would also require that Rural Radio stations comply with antenna height-power limits found in Part 22 of the Rules. We invite general comments on this proposal and also request suggestions on the technical details of how the proposal should be implemented. *See* Appendix A.[14]

15. Interested parties are invited to file written comments on their views concerning the elimination of the separate frequency allocation and the proposed rules concerning the Rural Radio Service.

16. Comments should be submitted in accordance with Rule Section 1.419, 47 C.F.R. § 1.419. Comments should be submitted by *January 19, 1984*, Reply comments by *February 21, 1984*. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex*

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[13] The secondary basis status requires that rural radio service be offered on an interference free basis to stations in the PLMS. Thus, if a primary station is located close to a secondary station and harmful interference occurs as a result; the secondary basis station could be ordered for example, to cease operations.

[14] The proposed rules in Appendix A follow the rules in the companion item, Report and Order in CC-Docket 80–57, Revision and Update of the PMS rules, Part 22.

parte presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

Regulatory Flexibility Act - Initial Analysis

17. *Reasons for Action and Objective*. The rules are being proposed to eliminate unnecessary regulation and policies and to provide service to the public in the most efficient, expeditious manner possible.

18. *Legal Basis*. The authority for this rulemaking is contained in Sections 4 and 303 of the Communications Act of 1934, as amended.

19. *Small Entities Affected and Potential Impact*. The impact of the proposed rule will be on all Public Mobile Service applicants and licensees and on members of the public receiving mobile service. Existing and potential applicants for this service range in size from single individuals and small partnerships to large multi-million dollar corporations. Small entities will not be economically adversely affected by these rules. We believe the rules will probably benefit small entities by giving them the opportunity to apply for frequencies which have not been available to them in the past.

20. *Relevant Federal Rules which Overlap, Duplicate or Conflict with this Action*. None.

21. *Reporting, Record-keeping and Compliance Requirements*. The rulemaking does not involve any additional reporting require-

ments other than those typically associated with the Public Mobile Service.

22. *Alternatives that would Lessen Impact*. None.

23. IT IS ORDERED that a copy of this order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission
William J. Tricarico, *Secretary*

Appendix A

Proposed Rule

47 CFR Part 22 is revised as follows:

1. Section 22.501 is amended by removing paragraph (i)(2) and revising paragraphs (b), (c), (h), and (i) to read as follows:

§22.501 *Frequencies.*

* * * * *

(b) For assignment to common carriers for two-way public land mobile service.

Base station frequencies (MHz):	***Mobile dispatch, and auxiliary test station frequencies (MHz)***
152.03	158.49
152.06	158.52
152.09	158.55
152.12	158.58
152.15	158.61
152.18	158.64
152.21	158.67
152.51	157.77*
152.54	157.80*
152.57	157.83*
152.60	157.86*
152.63	157.89*
152.66	157.92*
152.69	157.95*
152.72	157.98*
152.75	158.01*
152.78	158.04*
152.81	158.07*
454.025	459.025
454.050	459.050
454.075	459.075
454.100	459.100
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250

Base station frequencies (MHz):	*Mobile dispatch, and auxiliary test station frequencies (MHz)*
454.275	459.275
454.300	459.300
454.325	459.325
454.350	459.350
454.375	459.375*
454.400	459.400*
454.425	459.425*
454.450	459.450*
454.475	459.475*
454.500	459.500*
454.525	459.525*
454.550	459.550*
454.575	459.575*
454.600	459.600*
454.625	459.625*
454.650	459.650*

(c) All applicants who apply for frequencies listed in (b) with an asterisk must provide rural rural radio service when requested in addition to any other service that they will provide.

* * * * *

(h) *150 MHz band (paging).* The following frequencies may be used exclusively in providing paging.

152.24 MHz
152.84 MHz
158.10 MHz
158.70 MHz

(i) *450 MHz band (control, repeater).*

(1) The frequencies in this paragraph may be assigned for use for control or repeater stations. Series operation of more than one control or repeater station is not permitted.

Control station frequencies MHz:	*Repeater station frequencies (MHz)*
454.025	459.025
454.050	459.050
454.075	459.075
454.100	459.100
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250
454.275	459.275
454.300	459.300

Control station frequencies MHz:	*Repeater station frequencies (MHz)*
454.325	459.325
454.350	459.350
454.375	459.375
454.400	459.400
454.425	459.425
454.450	459.450
454.475	459.475
454.500	459.500
454.525	459.525
454.550	459.550
454.575	459.575
454.600	459.600
454.625	459.625
454.650	459.650

(2) [Reserved]

* * * * *

2. Section 22.601 is amended by revising paragraphs (a) and (b) to read as as follows:

§22.601 *Frequencies.*

(a) *General.* The following frequencies are available on a secondary basis in the rural radio service, provided no harmful interference is caused to stations in the Public Land Mobile Service.

(b) *Frequencies.*

Central office and interoffice station frequencies (MHz)*	*Rural subscriber and interoffice station-frequencies (MHz)*
152.03	158.49
152.06	158.52
152.09	158.55
152.12	158.58
152.15	158.61
152.18	158.64
152.21	158.67
152.51	157.77
152.54	157.80
152.57	157.83
152.60	157.86
152.63	157.89
152.66	157.92
152.69	157.95
152.72	157.98
152.75	158.01
152.78	158.04
152.81	158.07
454.025	459.025
454.050	459.050
454.075	459.075
454.100	459.100

Central office and interoffice station frequencies (MHz)*	*Rural subscriber and interoffice station-frequencies (MHz)*
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250
454.275	459.275
454.300	459.300
454.325	459.325
454.350	459.350
454.375	459.375
454.400	459.400
454.425	459.425
454.450	459.450
454.475	459.475
454.500	459.500
454.525	459.525
454.550	459.550
454.575	459.575
454.600	459.600
454.625	459.625
454.650	459.650

* Interoffice stations can only be applied for by carriers who are in the business of providing landline local exchange telephone service.

Note 1: Rural stations licensed as of the effective date of the adoption of final rules in this proceeding will be allowed to provide rural radio service on a primary basis (grandfathered).

(1) *Relay Stations*. The frequencies in paragraph (b) in this section may, be assigned to relay stations upon a showing why it is impracticable to achieve the required communications without relay stations.

* * * * *

3. Section 22.609 is revised to read as follows:

§22.609 *Supplementary Showing Required with Applications for Central Office Stations and Rural Subscriber Stations*

(a) Each application in this service shall be accompanied by a showing why it is impracticable to provide the required communication service by means of wireline facilities.

(b) Additionally where it is proposed to provide rural subscriber service through a base station, a showing should be made that the proposed rural subscriber service will not adversely affect the availability or adequacy of service to mobile subscribers.

(c) Each application must also provide:

(1) The showings required by §22.15(b), co-channel interference study and an interference study demonstrating that the proposed facility will not cause harmful electrical interference to those co-channel facilities identified in §22.15(b);

(2) height above average terrain. ***See*** **§22.115.**

(3) Effective radiated power. ***See*** **§22.505 and §22.506.**

Privacy of Communications
Recording Devices

Reconsideration and clarification of Commission's Order, 86 FCC 2d 313, revising the prescribed tariff provision concerning the recording of telephone conversations.
–Recording Devices
Docket No. 20840

FCC 83–479

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Use of Recording Devices in Connection with Telephone Service	Docket No. 20840

MEMORANDUM OPINION AND ORDER

(Adopted: October 19, 1983 Released: October 27, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. *INTRODUCTION*

1. Before the Commission are three petitions for clarification or reconsideration of portions of our Memorandum Opinion and Order in this proceeding, 86 FCC 2d 313 (1981) (*Order*), filed by American Telephone and Telegraph Company (AT&T),[1] the U.S. Department of Defense (DOD), and the U.S. Department of Justice (Justice).[2] In that decision, *inter alia*, we modified our policies concerning the use of recording devices in connection with telephone service to allow mutual consent to record as an alternative to the beep tone requirement, and we adopted three exceptions under which the recording party need neither obtain consent of the other party nor use a beep tone.[3]

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[1] AT&T's petition is for clarification only. AT&T also requested in its petition that the time for filing revised tariffs to comport with the order be extended until after the Commission resolved the petition for clarification. That extension was granted by the Chief, Common Carrier Bureau, Mimeo No. 4558, released June 14, 1982.

[2] The American Automobile Association (AAA) and Delphi Communications Corp. (Delphi) have each filed oppositions to AT&T's petition, and the Utilities Telecommunications Council (UTC) has replied to Delphi's opposition.

[3] The first exception is for incoming calls made to telephone numbers publicized for emergencies and outgoing calls made in immediate response. The second is for recording incoming calls made for patently unlawful purposes, such as bomb threats, kidnap ransom requests, and obscene telephone calls, and outgoing calls

2. The petitions for clarification or reconsideration do not question our decision to allow mutual consent as an alternative to the beep tone, although Justice and UTC raise the more fundamental question of the authority of the Commission to regulate in this area at all. Rather, the petitions seek clarification or embellishment of the specifics of this framework. Thus, they argue that our exception for court-ordered wiretaps is drawn too narrowly. In addition, AT&T asks us to (1) declare that consent must be given prior to recording; (2) prescribe the method for obtaining oral consent; (3) declare that the burden should be on the recording party to prove consent; and (4) clarify our exception concerning emergencies.

3. Upon further reflection, and without reaching the issue of the Commission's authority, we have come to the conclusion that there are sound reasons to discontinue regulation in this area altogether, rather than to continue to refine a regulation whose efficacy and lawfulness have been called into serious question. Accordingly, we will issue a Further Notice of Proposed Rulemaking to solicit comments on our proposal to vacate the current tariff prescription order and revoke Section 64.501 of the Rules, 47 C.F.R. §64.501.[4]

4. In the meantime, however, leaving open the possibility that the comments persuade us that it is in the public interest to retain some restrictions, we resolve below the other issues raised in the petitions for clarification or reconsideration.

II. *PETITIONS FOR CLARIFICATION OR RECONSIDERATION*

A. *Consent to Record*

5. In its petition for clarification, AT&T poses three requests concerning consent. First, under the supposition that our *Order* is unclear on the requirement that consent be obtained prior to recording, it asks that we amend the ordering clauses to specify prior consent. Second, noting that our order does not mandate the manner in which verbal consent is to be obtained, it asks that we require such consent to be recorded. Lastly, AT&T asks that we place the burden of proof on the recording party to demonstrate that consent to record has been properly obtained.

6. AAA and Delphi each partially oppose AT&T's request for clarification. They argue that the requirement of recording the actual consent would be an unnecessary regulation and that the method of obtaining consent should be left to the recording party.

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made in immediate response to such calls. The third exception is for recordings made pursuant to an explicit and lawful order of a court issued pursuant to 18 U.S.C. §2516. 86 FCC 2d at 321.

[4] This section requires telephone common carriers to use a beep tone device or obtain all party consent before recording a telephone conversation between a member of the public and a person acting for or employed by the common carrier.

Delphi believes that the caller who speaks to an answering service, for instance, is effectively on notice that the conversation is being recorded. Therefore, it reasons, consent to record may be inferred, and the burden of requiring consent to be recorded would be disruptive to the operation of telephone answering systems.

7. After carefully considering the above arguments, we will grant AT&T's request in part. We clearly intended that consent to record be obtained prior to recording a conversation. We will therefore clarify paragraph 23 of the Order to specify that the "all party consent requirement" is satisfied only if the consent is obtained prior to recording the conversation.[5] Moreover, while we recognize AAA's and Delphi's concern that the method of obtaining consent remain flexible, we are persuaded that if there is to be any possibility of enforcement, the consent, if verbal, must be recorded. Thus, if a telephone company's investigation into alleged nonconsensual recording discloses a conflict between the parties to the conversation on the matter of consent, the recording party will have to provide taped or written evidence that consent was obtained. At the same time, of course, as with all tariff prohibitions, the carrier will bear the burden of proving that a violation has occurred before it implements any enforcement procedures.

B. *Exceptions*

8. In our *Order*, we adopted three limited exceptions to our requirement of either a beep tone or all party consent prior to recording a telephone conversation. The first of those exceptions is "for incoming calls made to telephone numbers publicized for emergencies and outgoing calls made in immediate response." 86 FCC 2d at 321. AT&T requests that we clarify our intent with respect to the scope of this exception. It asks whether the definition is limited to fire, health care, and police type emergencies or whether it also includes situations such as emergency road service, emergency electrical outages, chemical emergencies, gas leaks, water main breaks, and downed electrical wires. AT&T further asks us to clarify what we mean by "health care emergencies."

9. Simply put, when we adopted this exception we intended to broadly define emergencies, including health emergencies. The exception is not limited to police, fire, and ambulance services, but rather is intended to also include numbers publicized to handle situations such as gas leaks, emergency road service, and chemical emergencies. In other words, we intend this emergency exception to include telephone numbers publicized for any emergency where health or safety of life and property is at stake.

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[5] The ordering paragraph 25, however, which directs carriers to revise their tariffs to comport with the Order, does not need revision as it is already broad enough to include the requirement of prior consent.

10. Another exception to the beep tone or mutual consent requirement is "for recordings made pursuant to an explicit and lawful order of a court issued pursuant to 18 U.S.C. § 2516." AT&T, DOD and Justice all claim that this exception is too narrowly drawn, and ask that the exception be broadened to include a) interceptions authorized pursuant to the Foreign Intelligence Surveillance Act of 1978 (Foreign Intelligence Act), 50 U.S.C. § 1801 *et seq.*, and b) emergency and other electronic surveillance permitted without a court order pursuant to the Omnibus Crime Act. In addition, AT&T asks that the exception be extended to include lawful electronic surveillance by state law enforcement authorities, while DOD asks that the exception include communication security monitoring conducted by the National Security Agency pursuant to Executive Order 12036, 43 Fed. Reg. 3682, 3683 (1978), U.S. Code Cong. & Ad. News 7 at 9650–9652. Lastly, DOD and Justice both argue that the wording in our exception should be revised to delete the words "explicit and lawful." They claim that such wording seems to place an obligation on the common carrier to verify the validity of the order. Without such wording, according to petitioners, the common carrier would be able to comply with the order automatically when it is presented.

11. We agree that the exception for recordings made pursuant to a court order should be clarified and expanded. We agree with the DOD and Justice argument that a common carrier should be able to assist law enforcement officials by providing an interception pursuant to a court order without having to judge the lawfulness of that order independently. Thus, the words "explicit and lawful" will be deleted. Moreover, it is not our intention to interfere with federal communications security monitoring or legitimate recording by law enforcement or federal intelligence agencies. We agree therefore that our exception should be broad enough to encompass recordings authorized by court orders issued pursuant to statutes in addition to the Omnibus Crime Act, as well as law enforcement and federal intelligence recordings and communications security monitoring permitted without a court order by the Omnibus Crime Act, other statutes or Executive Order. Accordingly, we will amend the third exception (Order, Para. 21) as follows:

> The third exception is for recordings made by Federal, State, or local law enforcement authorities or federal intelligence authorities acting under color of law. We adopt this exception so that our requirement will not hinder law enforcement efforts.

III. *CONCLUSIONS AND ORDERING CLAUSES*

12. As discussed above, after considering the arguments presented here, we have decided to broaden the exception for law enforcement recording. Additionally, we have clarified that the consent to record must be obtained prior to the recording; that the consent, if

verbal, must be recorded; and that "emergencies" are to be defined broadly in the exception "for incoming calls made to telephone numbers publicized for emergencies and outgoing calls made in immediate response." Finally, in a separate document we are issuing a notice of proposed rulemaking to solicit comments on our proposal to discontinue regulation in this area.

13. Accordingly, IT IS ORDERED, That, the petitions for clarification or reconsideration filed by American Telephone and Telegraph Company, the U.S. Department of Defense, and the U.S. Department of Justice ARE GRANTED to the extent indicated above and are otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Intercepted Communications
Recording Devices

Further Notice of Proposed Rulemaking adopted re use of recording devices in connection with telephone services.
–Recording Devices
Docket No. 20840

FCC 83–480

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Use of Recording Devices in Connection with Telephone Service	Docket No. 20840

FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted: October 19, 1983; Released: October 27, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

1. In a separate order, *Memorandum Opinion and Order, Use of Recording Devices in Connection with Telephone Service*, Docket No. 20840, FCC 83–479, adopted today, the Commission has reconsidered and clarified portions of a prior order in this docket (86 FCC 2d 313 (1981)), which modified our policies concerning the use of recording devices in connection with telephone service to allow mutual consent to record as an alternative to the beep tone requirement. Upon further reflection on the issues raised in that proceeding, we have come to the conclusion that there are sound reasons to discontinue regulation in this area altogether, rather than to continue to refine a regulation whose efficacy and lawfulness have been called into serious question (See para. 2 of the companion order). However, as will be recalled, the thrust of the notice of proposed rulemaking in this proceeding was simply to liberalize the Commission's policies regarding recording devices while strengthening the enforcement tools.[1] In other words, we did not call for comments on whether we should eliminate the beep tone tariff requirement. Accordingly, to complete the record on this question, we now are issuing a further notice of proposed rulemaking to solicit comments on our proposal to

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[1] *See* Notice of Inquiry, FCC 76–536, released June 24, 1976 and Notice of Proposed Rulemaking, 67 FCC 2d 1392 (1978).

vacate the current tariff prescription order and revoke Section 64.501 of the Rules, 47 C.F.R. §64.501.[2]

2. The Commission first formulated a beep tone policy in 1947 at a time when there were no federal statutes regulating this area of privacy. Recognizing a legitimate public need for recording devices, the Commission adopted an order which required that all interstate tariffs allow the use of recording devices for recording two-way telephone conversations involving interstate message toll telephone service or wide area telephone service or their facilities. Equally concerned about the privacy of telephone communications, however, the Commission also mandated a tariff provision requiring that an automatic tone warning mechanism ("beep tone") be superimposed on the conversation at regular intervals during the recording.[3] Furthermore, it required the recording device to have a direct electrical connection to the telephone. This direct connection enabled the telephone company to detect the presence of these recorders on the telephone line. Today, however, the state of the art is such that customers can record with inexpensive acoustic and inductive recorders which cannot be detected by the telephone company. Consequently, the present tariff requirement is practically unenforceable.

3. Accordingly, we instituted Docket No. 20840 to reexamine the desirability and enforceability of our beep tone requirement in light of the technological and regulatory changes which have occurred since the termination of Docket No. 6787 in 1948. Consistent with our objective of finding the least expensive and least obtrusive warning technique which would at the same time protect the privacy of the telephone user, we adopted all party consent as an alternative to the beep tone and eliminated the prohibition against acoustic and inductive recording devices. In doing so, we rejected another major proposal, which was to change the beep tone requirement from a tariff provision, enforceable by the telephone company, to a rule of the Commission. Under this regime, a violation of the rule would have subjected the violator to the sanctions of §§502 and 401(b) of the Communications Act, 47 U.S.C. §§502 and 401(b).[4] We reasoned that because the telephone companies were unable to enforce their tariff provisions effectively, we similarly would have no way to enforce such a rule. Since there is no effective way to detect violations, the Commission concluded that the added sanctions under the Act would not be a deterrent, but merely a punitive measure for the small

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[2] This section requires telephone common carriers to use a beep tone device or obtain all party consent before recording a telephone conversation between a member of the public and a person acting for or employed by the common carrier.

[3] *See* Use of Recording Devices in Connection with Telephone Service, Docket No. 6787, 11 FCC 1033 (1947).

[4] §502 provides for fines and §401(b) provides for injunctive sanctions.

number of violators actually detected. Moreover, we were concerned that adopting such a Commission rule might engender in the public a false sense of security that recording without consent would not occur. Another significant factor behind this decision was that privacy in telephone conversations is now regulated by federal statute. Thus, we took notice that subsequent to our original involvement in this area, Congress had adopted comprehensive legislation in the Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Crime Act"),[5] which, *inter alia*, imposes strict penalties, both civil and criminal, for certain acts of interception and divulgence of telephone conversations.

4. Taken to their logical conclusion, the implementation questions raised on reconsideration (see para. 5 of the companion order), and the reasons which persuaded us not to adopt the tariff regulations as a rule of the Commission now lead us to tentatively conclude that we should eliminate our beep tone or all party consent tariff requirement. While the all party consent alternative and removal of the prohibition against inductive and acoustic devices were steps in the right direction in liberalizing the Commission's policies regarding recording devices, their potential salutary effects still seem severely compromised because of the lack of enforcement tools. Even if substantial resources were devoted to detecting unauthorized recordings, it is clear that any such program would be ineffective. Moreover, the enforcement option available to the telephone company, *viz.* suspension of service, is not a suitable penalty except in blatant circumstances. Although the tariff requirement may be a deterrent in some cases, in many others the possible loss of service would not be a factor when weighed against the benfit of a record of the conversation. Indeed, violators are seldom detected except when they voluntarily produce the illicit recording to substantiate the contents of the conversation, either in court or elsewhere. On the other hand, to persons who talk freely on the telephone under the assumption that the beep tone or all party consent requirement adequately protects their privacy, the Commission's existing regime may actually create a false sense of security. We believe telephone users would be better served by a resolution of the problem which makes it clear that their only viable protection against an unlawful recording by another party is the Omnibus Crime Act, which provides remedies only if an improper use is made of the recording. See para. 3, *supra*, and n. 7 *infra*.

5. Our action here does not evince an abandonment of our commitment to the importance of privacy in telephone conversations. Rather, we simply do not believe that either our involvement

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[5] U.S.C. §§2510–2520.

in this area or the telephone companies' enforcement of this tariff has been effective.[6] The sanction of *possible* loss of service for recording a conversation in violation of the tariff is not meaningful. On the other hand, we view the Omnibus Crime Act as a more effective deterrent to invasion of privacy than the beep tone or the all party consent tariff provision. Significantly, Congress has not seen fit to ensure that a conversation will recorded only if all parties consent. If a public need is perceived for a more extensive protection of privacy than that guaranteed by the Omnibus Crime Act, we believe Congress is the appropriate body to provide that kind of protection.[7] Therefore, while reaffirming our commitment to privacy in communications, we conclude that we should defer to the regulatory scheme of the Omnibus Crime Act, a comprehensive set of rules governing various aspects of privacy in both interstate and intrastate oral and wire communications, which provides strict penalties for the wrongful use of a recorded conversation.[8]

6. This notice is being issued to determine whether elimination of the current tariff prescription is just, fair and in the public interest. We expect to develop in this notice and comment rulemaking all the relevant, material and probative data and information needed to make the public interest determination.

7. In accordance with the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.*, we find that this rulemaking will not have a significant economic impact on a substantial number of small business entities. To the extent that there is any impact, it will be positive. Telephone common carriers will no longer be required to expend resources investigating allegations of violation of the beep tone or all party consent tariff provision. Those entities wishing to record their business telephone conversations may do so without investing in costly beep tone equipment or implementing

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[6] As telecommunications becomes more competitive, and the number of providers of service increases, it will become even more difficult to police unauthorized recordings.

[7] Accordingly, we also solicit comments on whether, if our proposal ultimately is adopted, we should recommend legislation in this area, refer the record in this proceeding to Congress, or take any other action.

[8] Justice has argued in its petition that Congress specifically intended to take the regulation of privacy of wire communications out of the Communications Act when it enacted the Omnibus Crime Act. Therefore, it maintains, the FCC cannot penalize or regulate interceptions authorized by the more specific Omnibus Crime Act by issuing regulations pursuant to the more general Communications Act, particularly where those regulations are incompatible with the Omnibus Crime Act. The Omnibus Crime Act does not require that the person making the recording obtain the consent of all the parties to the conversation. It is enough if one party consents, except where the communication is intercepted for "criminal", "tortious" or "injurious" uses. See Section 2511(2)(d). Since we are proposing to eliminate Commission involvement in this area, we may not need to decide whether we do, indeed, have the authority to maintain our current policies on unauthorized recordings.

procedures to obtain prior written or oral consent from each party being recorded.

8. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

9. Accordingly, IT IS ORDERED, That a rulemaking proceeding IS INSTITUTED to determine whether the elimination of the telephone companies' prescribed tariffs governing the recording of two-way telephone conversations using interstate MTS or WATS service or facilities and Section 64.501 of the Rules, 47 C.F.R. § 64.501, as proposed, is just, fair and reasonable and in the public interest. This proceeding is instituted pursuant to Sections 2(a), 4(i), 4(j), 201, 205, and 403 of the Communications Act, 47 U.S.C. §§ 152(a), 154(i), 154(j), 201, 205 and 403.

10. IT IS FURTHER ORDERED, That interested persons may file written comments on or before December 5, 1983 and reply comments on or before December 20, 1983. In reaching its decision in this matter the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. All comments and reply comments shall be filed in accordance with Section 1.419 of the Rules, 47 C.F.R. § 1.419. Materials filed in this proceeding will be available for public inspection during regular business hours in the Commission's Public

Reference Room at its headquarters at 1919 M St., N. W., Washington, D. C.

11. IT IS FURTHER ORDERED, That the Secretary shall cause this Further Notice of Proposed Rulemaking to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 CFR Part 64 is amended as follows:

1. By removing subpart E.

Application, Mutually Exclusive
Court of Appeals, Implementation of Order
Petition to Deny
Remand from Court of Appeals

Sections 73.3539 and 73.3516(e)(i) of rules waived and deadline established for filing petitions to deny and mutally exclusive applications. United States Court of Appeals vacated to an extent Commission order, *RKO General, Inc.*, 82 FCC 2d 291 (1980) and remanded the matter for further proceedings consistent with the court's opinion.
–*RKO General, Inc.*

FCC 83–55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC.	
For Renewals of Licenses for Stations:	
WHBQ-TV, Memphis, Tennessee	File No. BRCT-79042LC
WHBQ, Memphis, Tennessee	File No. BR-79042CZ
WOR, New York, New York	File No. BR-177
WRKS (FM), New York, New York	File No. BRH-14
WRKO, Boston, Massachusetts	File No. BR-953
WROR (FM), Boston, Massachusetts	File No. BRH-617
KHJ, Los Angeles, California	File No. BR-22
KRTH (FM), Los Angeles, California	File No. BRH-25
WGMS, Bethesda, Maryland	File No. BR-1403
WGMS-FM, Washington, D.C.	File No. BRH-789
KFRC, San Francisco, California	File No. BR-43
WAXY (FM), Ft. Lauderdale, Florida	File No. BRH-781002WR
WFYR (FM), Chicago, Illinois	File No. BRH-7901A3

MEMORANDUM OPINION AND ORDER

(Adopted: February 9, 1983; Released: February 11, 1983)

BY THE COMMISSION: COMMISSIONER SHARP ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration its order of November 26, 1980, designating the above captioned applications of RKO General Inc. (RKO) for hearing[1] and an opinion of the United States Court of Appeals which reviewed the Commission's decision.[2] In its order, the Commission designated the most recent renewal applications of RKO for hearing to determine what effect, if any, the decision denying the application of RKO for renewal of license of station WNAC-TV, Boston, Massachusetts,[3] should have on RKO's remaining broadcast licenses.

2. On appeal, the Court vacated our order to the extent that it suspended the right to file competing applications and remanded the matter to us for such further proceedings as we deem appropriate consistent with the Court's opinion. Pursuant to the Court's remand, we hereby waive the cut-off rules and provide the opportunity for the filing of competing applications. It should be emphasized that our immediate concern is to permit the filing of applications which are mutually exclusive with those above-captioned renewal applications of RKO. At this juncture, no useful purpose would be served by requiring or permitting RKO to file new or updated renewal applications for the thirteen stations involved.[4] Accordingly, Section 73.3539 of the Commission's Rules is waived. In accord with the Court's mandate, Section 73.3516(e)(1) is also waived and the deadline for filing mutually exclusive applications will be the 90th day after release of this order.

3. The procedure which we ultimately employ in this proceeding may turn on how many mutually exclusive applications are filed. Petititions to deny directed against RKO pursuant to Section 73.3584(a) of the Commission's Rules shall be filed by the deadline for the filing of mutually exclusive applications, *i.e.*, 90 days from release of this order.[5] Petitions to deny any competing application

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[1] *RKO General, Inc.*, 82 FCC 2d 291 (1980).

[2] *New South Media Corporation v. FCC*, 685 F. 2d 708 (D.C. Cir. 1982).

[3] *RKO General, Inc. v. FCC*, 670 F. 2d 215, *cert. denied*, 102 S. Ct. 1974 (1982) (hereinafter "Boston decision").

[4] In this connection, the information provided in the current renewal forms can be obtained in greater depth and detail in the respective public inspection files. RKO's ability to present mitigating evidence concerning the Boston misconduct and to run on its record, a matter unrelated to the fact that current renewal forms are not on file, will be considered and defined in a subsequent order.

[5] In this connection, petitions to deny filed by applicants are treated as motions to enlarge issues when they seek to raise qualifying issues as opposed to issues relating to the acceptability of an application. Accordingly, such motions should be

that may be filed in this proceeding will be governed by Section 73.3584 in conjunction with Sections 73.3571(c), 73.3572(c) and 73.3573(d) of the Commission's Rules.

4. Since RKO will not be filing new or supplemental renewal forms, the requirements of Section 73.3580(d) will have to be modified accordingly. Pre-filing announcements pursuant to Section 73.3580(d)(4)(i) will be dispensed with. However, RKO shall file post-filing announcements tailored to this unique situation. Commencing with the release of this order, it shall therefore broadcast announcements informing the public of the pendency of its renewal applications in a manner consistent with Sections 73.3580(d)(4)(ii), (iii) and (iv) of the Commission's Rules.[6]

5. One further matter warrants comment. It is our present intention to fashion a procedure which will not only respect the rights of the parties, but provide an orderly and expeditious resolution of the matters at hand. Our first order of business is resolving the impact of the Boston decision on RKO's basic qualifications.[7] Order and expedition may require that this matter be resolved first before any other matters concerning RKO, its competitors or the comparative merits of the various applicants are considered.[8]

6. Accordingly, it is ordered, that Sections 73.3539 and 73.3516(e)(1) of the Commission's Rules are waived to the extent indicated herein, and that the deadline for filing petitions to deny and applications mutually exclusive with those above-captioned applications shall be on or before May 12, 1983.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER STEPHEN A. SHARP

Re: RKO General, Inc. Hearing Procedures

I join in the Commission's Order in this proceeding only because the United States Court of Appeals for the District of Columbia Circuit has ordered the Commission to take this action. In its decision in *New South Media Corp. v. FCC*, 658 F.2d 708 (D.C. Cir.

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filed after designation with the Administrative Law Judge pursuant to Section 1.229 of the Rules.

[6] RKO's attention is especially directed to Section 73.3580(d)(4)(iv) which applies to stations which have not received a renewal grant since the filing of their previous renewal application.

[7] In addition to mutually exclusive applicants, others who wish to participate in this determination and can otherwise establish their interest in this matter may avail themselves of Sections 73.3584, 73.3587, 1.223 and/or 1.225 of the Commission's Rules.

[8] The impact, if any, of the related Los Angeles proceeding, Docket Nos. 16679–80, involving RKO and Fidelity Television, Inc., on the concerns raised here will be addressed in subsequent orders.

1982), the court overstepped its authority by unduly restricting our authority to structure our processes. By its action the court has done the public, itself and this Commission a disservice.

The series of administrative proceedings and appellate litigation surrounding RKO General's broadcast licenses has been both complex and extraordinary. Indeed, it is in such an unusual proceeding that judicial review must take the fullest cognizance of an agency's familiarity with its own processes to permit it to fashion a procedure which will meet the goals of its organic statute in the context of a proceeding which would otherwise disrupt not only necessary administrative procedures but, far more importantly, those statutory goals themselves. To my mind, this is the message of that recent "towering" decision of the Supreme Court in *Vermont Yankee.* Yet, significantly, that decision is nowhere mentioned by the Court of Appeals.

Consistent with this omission is the lack of statutory guideposts in the court's analysis, from either the Communications Act or Administrative Procedure Act. Instead, the court relied on a perfunctory salute to *Ashbacker* and a brief comparison of the facts of this case with those of only two others among the Commission's comprehensive jurisprudence. The court then determined simply that the instant matter was more similar to one than to the other, with the result that the Commission's decision was wrong.

In sum, the court overruled this agency's action on the basis of its disagreement with the "reasonableness" of the agency's preferred mode of proceeding. For example, the court stated that "even if competing applications could be subordinated to efficiency concerns," the court had "reason to doubt that the FCC has charted an efficient resource-conserving course." 685 F.2d at 717. Further, the court's decision implied that although the Commission's choice of procedure may have been reasonable when it was adopted in 1980, it was "no longer reasonable" in light of intervening events. 685 F.2d at 710.

The procedural approach adopted by the Commission was reasonable not only in 1980 as the court of appeals seemed to have recognized, but also continues, notwithstanding the court's second-guessing to the contrary, to offer a much better mechanism for expeditious selection of qualified licensees than that preferred by the court. Even if the court's decision does not foreclose the Commission from holding a bifurcated proceeding with RKO's basic qualifications to be decided first, with all competing applicants participating, and with comparative aspects of the proceeding to be held thereafter, such a procedure would be neither expeditious nor economical of the Commission's resources.

The court's decision illustrates the serious consequences of a court impermissibly substituting its judgment for the agency on a matter left by Congress to the agency's discretion. The Commission in this case had to decide how to determine RKO's qualifications to hold licenses for 13 broadcasting stations in light of the June 1980 decision which disqualified RKO as the licensee of station WNAC-TV in Boston. Most of these 13 stations are located in major broadcast markets.[1] In view of past experience with the numbers of applicants filing for available broadcasting frequencies, including those in smaller markets,[2] it is realistic to expect that these 13 frequencies could attract 100 or more competing applications, at least if such applications must be entertained, as the court below has directed, while the impact of RKO's disqualification in Boston on its qualifications elsewhere remains unresolved.

The procedural nightmare of numerous parties participating at the qualifications stage was obvious to the Commission and should have been obvious to the court. Although it purports to promote *Ashbacker* interests, the court has only assured lengthy delays, during which these 13 stations will continue to be in the hands of RKO while its qualifications remain to be resolved by the Commission.[3]

In addition to its unwarranted intrusion into the Commission's internal procedures, the court has improperly deprived the Commission of certain substantive options which the Commission may have wished to use as a means of placing these 13 stations in qualified hands as quickly as possible. Specifically, these options include renewing RKO's licenses on the condition that RKO sell or transfer the stations within a short period of time or permitting RKO to sell its 13 stations to minority-controlled applicants at a "distress" price of 75 percent or less of the fair market value of the stations.

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[1] The thirteen RKO stations include facilities in New York, Los Angeles, Chicago, Boston, San Francisco, Washington, D.C., Memphis and Fort Lauderdale.

[2] For example, in the *KRLA* case, *see Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977), nineteen applications were filed for one AM radio frequency in the Los Angeles area, resulting in a Commission proceeding that lasted 16 years and was resolved only by a settlement among the remaining applicants. More recently, a Newark, New Jersey FM frequency drew 30 applications and proceedings involving radio facilities in markets as small as Glendale, Arizona and Homestead, Florida have attracted thirteen or fourteen applications. *See, e.g., FM Broadcast Applications Accepted For Filing and Notification of Cut-Off Date* Report Nos. B-27 (June 21, 1982) and B-31 (Sept. 17, 1982).

[3] The court seized upon the fact that in *Carlisle Broadcasting Associates*, 59 FCC 2d 885 (1976), the Commission's public interest balance was more to the court's liking. 685 F.2d at 716. In *Carlisle*, the qualifications of the licensee of a single station in Carlisle, Pennsylvania, were pending before the Commission in 1975 although no hearing on the qualifications issue had yet commenced. The Commission then allowed a single competing applicant to file its application, relying in part on the renewal application's pre-hearing status and pointing to the public interest considerations served by competing applicants. The court improperly focused on one similar fact between Carlisle and the present case, namely the absence of an ongoing hearing, while ignoring readily apparant differences between the two cases which would justify the Commission's refusal to deem *Carlisle* controlling in this case or even to find it necessary to distinguish *Carlisle*. See 685 F.2d at 716 and n. 14. In sum, it is not consistent with the Commission's broad discretion over its internal procedures for the court of appeals to hold the agency to its *Carlisle* balance when very difference circumstances are involved.

If the "towering" *Ashbacker* decision served as the "court's beacon", the court's murky reasoning in this case clearly proves that the illumination received decreases geometrically the farther away from the source of the light. Although relying heavily on what it regarded as "the spirit" of the *Ashbacker* decision, 685 F.2d at 714, the court failed to find that any *Ashbacker* rights of competing applicants were adversely affected. Nor could it have done so. *Ashbacker's* holding was that where a frequency has been made available for competing applications and two such applications were filed, then "the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." 326 U.S. at 333. *Ashbacker* did not decide that the FCC could not determine a potential applicant's eligibility to participate in a proceeding. *Ashbacker* clearly did not reach the question presented here concerning not *whether*, but *when* the comparative proceeding would occur. The court's references to *Ashbacker* thus serve only to disguise the extent to which the court substituted its judgment for that of the FCC concerning the proper mode of proceeding in discharging the agency's substantive responsibilities.

The court has interfered with the Commission's discretion to control its own procedures and structure its own docket without any attempt to reconcile its action with repeated decisions of the Supreme Court, both in the adjudicatory and rulemaking contexts, which have upheld the Commission's broad discretion over matters of procedure. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 143 (1940); *FCC v. Schreiber*, 381 U.S. 279 (1965); *Federal Communications Commission v. WJR*, 337 U.S. 265, 276, 282 (1949). Furthermore, the decision ignores the admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), that this circuit should desist from imposing additional procedural limitations on agency action beyond those required by Congress. Mere judicial doubt that an agency has chosen the most efficient course is not a lawful ground on which agency action may be set aside. And courts cannot properly insist that agency procedures by "perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result." 435 U.S. at 546.

In so doing the court has seriously disrupted the Commission's efforts to discharge its important statutory responsibility to ensure that the 13 broadcasting stations at issue in the immediate proceeding are in the hands of a qualified licensee. The court's procedure will also impose an inordinate burden on the Commission's staff at a time when it is already severely constrained by budgetary limitations and faces substantial additional demands. Finally, the decision will become an important precedent for severely restricting the Commission's flexibility to structure analagous proceedings involving the qualifications of broadcasters who hold multiple licenses in the public interest.

The essence of the court's decision is that it did not like the choice the Commission made in selecting a procedure to deal with an unusual situation. The court thought it had a better way to reach the same result and imposed it upon the Commission. Such blatant interference is bad law and bad policy, and it is the public who will pay the price.

Common Carrier, Definition
Domestic Fixed Satellite
Satellite Domestic Communications

Application granted to sell up to five transponders on the SBS III satellite for the provision of low power satellite-to-home video services.
- *Satellite Business Systems*

FCC 83–403

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of SATELLITE BUSINESS SYSTEMS For Modification of Domestic Fixed-Satellite Space Station Authorization to Permit Noncommon Carrier Transponder Transactions	File No. 1091-DSS-MP/ML-83

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted: September 9, 1983 Released: November 2, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT

1. The Commission has before it an application filed by Satellite Business Systems (SBS) to modify its domestic satellite space station authorizations so that it may provide up to five transponders on the SBS III satellite to a customer on a noncommon carrier basis. This application was submitted pursuant to the Commission's decision in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982) (*Transponder Sales Order*). A petition to deny was filed by United States Satellite Broadcasting Company, Inc. (USSB). For the reasons discussed below, we deny that petition and grant the application of SBS.

2. In its application, SBS proposes to provide five transponders on a noncommon carrier basis to News Satellite Television Ltd. (NSTL), a British company affiliated with News America Publishing Incorporated. The agreement provides for the lease of transponders on the SBS III satellite for a six year period. At NSTL's option the lease may be extended to seven years or the transponders may be purchased at any time during the lease period. NSTL has formed a joint venture with Inter-American Satellite Television Company

(IAST) and plans to use these transponders to offer satellite-to-home television service to subscribers in thinly populated areas of the 48 contiguous states. The service is to commence by the end of 1983. The SBS III satellite was launched in November 1982 and is designed for a seven year lifetime.

3. Pursuant to the informational requirements contained in paragraph 55 of the *Transponder Sales Order*, SBS indicates that these are the only transponders it currently plans to offer on a noncommon carrier basis. It further states that it will not hold itself out to indiscriminately serve the public with respect to the offering of these five transponders for video services. Moreover, it indicates that the remaining 25 transponders on its current complement of three in-orbit satellites will continue to be available for furnishing common carrier services, and that these five transponders will be provided to the purchasers for substantially the lifetime of the satellite. Also, a sample contract illustrating the principal terms of the noncommon carrier arrangement was submitted.

Pleadings

4. In its petition, USSB insists that this transaction is violative of the Commission's transponder sales policies. In particular, USSB contends that a long-term lease with an option to purchase was not contemplated by the *Transponder Sales Order*. In support of this contention, USSB argues that the offering is for profit, that SBS has previously demonstrated its intent of indiscriminate offerings in its tariffs and license applications, that SBS was approached by NSTL, and that SBS has not previously expressed any interest to serve anything other than standard domestic satellite needs. Moreover, it believes that SBS has failed to distinguish its lease/purchase option plan from its common carrier activity. Thus, under the criteria established in the *Transponder Sales Order*, USSB believes that SBS' intent is to serve all prospective customers indifferently and therefore is common carriage in fact.

5. Even if the Commission were to consider the SBS proposal consistent with the *Transponder Sales Order*, USSB believes that it is contrary to the public interest and should be denied. Specifically, USSB argues that this proposal is so spectrally inefficient that its authorization would disserve the public interest. For example, according to USSB all the power available on the SBS transponder will be needed to transmit the NSTL signal; however, only 24 MHz of the 43 MHz SBS transponder bandwidth will actually be used. This will result in spectral inefficiency since the remaining transponder bandwidth is unusable. Additionally, USSB argues that the quality of the signal delivered to subscribers' homes will be unacceptably low. Furthermore, they argue that these transponders could result in interference between adjacent satellite transmissions. Consumers will also suffer from this proposal, according to USSB, because they

will not be able to receive television services from both domestic and DBS satellites using the same earth station because of the technical infeasibility of designing receivers with sufficient broadband capabilities. This they believe will result in a lessening of competition between DBS type services. Also, USSB argues that the grant of this application will inhibit the competition for 12;14 GHz transponders and thus frustrate the Commission's attempt to deregulate domestic satellite carriers in the Competitive Common Carrier proceedings in CC Docket No. 79–252.

6. Finally, USSB contends that even if the Commission were to approve these transactions, NSTL must be regulated as a broadcaster under the Communications Act. In support of this contention, USSB points to the definition of "broadcasting" in the Act as a means for "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o). USSB contends that it is NSTL's intent to disseminate radio communications to the public. As such, it believes that NSTL must be subject to the broadcast provisions of Title III relating to political broadcasts and sponsor identification. Moreover, because NSTL is a British company, the application must be dismissed because NSTL is not qualified to hold a broadcast license under the alien ownership restrictions of Section 310 of the Act, 47 U.S.C. § 310.

7. In its reply SBS disputes USSB's contention that its proposal is inconsistent with the *Transponder Sales Order*. It contends that the public interest underpinnings of that order rest with the advantages to be gained by permitting satellite operators and customers to enter into long-term agreements. Moreover, the Commission specifically contemplated the provision of transponders by means of long-term noncommon carrier leases. It further argues that the long-term arrangement between SBS and NSTL contains all the salient features which the Commission identified when it authorized noncommon carrier transponder sales. In particular, SBS points to the fact that this is a long-term agreement which will cover substantially the life of the transponders. Furthermore, it believes that there is no meaningful way to distinguish between a long-term lease and a sale, and thus such a distinction can not be used to disqualify this transaction. In fact, SBS contends that this transaction is very similar to the previously approved sale transactions of Hughes Communications and Southern Pacific.

8. In addition, SBS argues that grant of its application would be consistent with the Commission's public interest findings in *GTE Satellite Company*, 90 FCC 2d 1009 (1982), *recons. denied*, FCC 83–271 (released June 23, 1983), when it permitted United Satellite Communications, Inc. to provide a similar type of service using fixed satellite transponders. SBS also points to the adoption of international footnote 836 which permits satellite-to-home service utilizing fixed

satellite transponders. *First Report and Order* in General Docket No. 80–739, FCC 83–272 (released June 10, 1983). Moreover, SBS argues that its proposal is both technically feasible and not inefficient. It believes that even if the signals were not of a fully acceptable quality, the marketplace, not the Commission, should be the arbitrator of the success of the service. And, if the service proves to be a success, then the marketplace will insure the elimination of any inefficiencies in future satellite designs. SBS also opposes USSB's contention that these transponders will cause unacceptable interference to adjacent satellites.

9. Finally, SBS rejects USSB's argument that the Commission should impose broadcast regulations on NSTL. It points out that broadcast obligations have been imposed only on firms who are Commission licensees, and which operate licensed transmission equipment *and* control the programming delivered to the public by that equipment. SBS contends that USSB has failed to identify any discernible reason to distinguish the program offering of the IAST/NSTL venture from other similarly situated services with regard to the imposition of Title III broadcast requirements. SBS also argues that the foreign ownership provisions of Section 310 are not applicable in this case. The proposed transaction does not involve the transfer or acquisition of a Title III licensed facility because the elements of control over the facility will remain with SBS who continues to be the satellite licensee.

Discussion

10. In the application before us, SBS requests authority to provide five transponders on a noncommon carrier basis. These transponders will be provided on the SBS III satellite for its remaining estimated lifetime. USSB contends that arrangement devised by SBS for the disposition of these transponders is contrary to the *Transponder Sales Order* and the public interest. We disagree.

11. In our *Transponder Sales Order*, we authorized several licensees to offer transponder facilities on a noncommon carrier basis. An important aspect of that order was the demonstrated need and desire of both the licensee and its customer to enter into a long-term, stable relationship. We found that such transactions served the public interest, were consistent with our regulatory policies, and were noncommon carrier in nature. Although the SBS transaction is couched in the terms of a lease, its salient features are equivalent to the sales transactions approved previously.[1] In the *Transponder Sales Order*, we applied the test for noncommon carrier status

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[1] Of course, long-term lease arrangements are allowed under tariff. *See, e.g., RCA American Communications*, 89 FCC 2d 1070, 1077 (1982). Such lease arrangements have also been allowed on a non-tariffed basis. *See, e.g., National Aeronautics and Space Administration*, 61 FCC 2d 56 (1976). There, we found the determining factor to be whether there is a holding out to the public. *Id.* at 58.

enunciated by the Court in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). The Court there held that an entity is a common carrier if it holds out its service indiscriminately to the public. 525 F.2d at 642. A carrier is not likely to be "holding out" if "its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." 525 F.2d at 641 (footnote omitted). Factors that indicate noncommon carrier operations include the existence of long-term contractual relationships, a high level of stability in the customer base, and individually tailored arrangements. 525 F.2d at 643. These elements are present in the SBS transponder lease proposal, just as they were in the sales arrangements we authorized in the *Transponder Sales Order*. Like the earlier sales transactions, the SBS noncommon carrier proposal provides for the payment of an individually negotiated fixed price for essentially the lifetime of the satellite.[2] Accordingly, we reject USSB's arguments that the elements of the SBS-NSTL transaction are inconsistent with the criteria established in the *Transponder Sales Order* as indicative of noncommon carrier transactions.

12. We also agree with SBS that its proposed long-term transactions will serve many of the same public interest purposes that we identified in our *Transponder Sales Order*, *supra* at 1251–1253. These include risk sharing, assured capacity, and more certain planning. Nor will the disposition of these five transponders on a noncommon carrier basis jeopardize the availability of other current common carrier services. Only five of the thirty in-orbit SBS transponders are proposed to be offered on a noncommon carrier basis, and we calculate that only 12.8%[3] of *all* authorized satellite capacity will be available on a noncommon carrier basis. Thus, use of these transponders as proposed by SBS will not inhibit the availability of common carrier transponder service. We therefore find no reason to compel SBS to offer its transponders only on a common carrier basis. Finally, we find groundless USSB's concern that transactions such as that proposed by SBS – new satellite-to-home video programming services in the 12/14 GHz bands – will frustrate the development of a more competitive domestic satellite service. No present or potential user of SBS' facilities has claimed, nor has USSB demonstrated, that use of 12/14 GHz transponders for this kind of service is likely to

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[2] Other variations in contract features are supportive of, but not central to, the determination of the noncommon carrier nature of the SBS transaction.

[3] This figure was derived by dividing the total number of authorized transponders (912), which excludes the 48 Advanced Westar transponders, by the total number of authorized transponder sales (118), which excludes the 24 transponders sold to MCI Telecommunications and the two transponders sold to Equatorial Communications, both of which involve carrier-to-carrier transactions. Thus, these 26 transponders will continue to be used to serve the public on a common carrier basis.

inhibit the introduction or growth of other kinds of domestic satellite services. To the contrary, we believe that approval of this transaction will result in the early availability of an additional service to the public.[4]

13. USSB also argues that there are special public interest considerations of a technical nature surrounding the use of these transponders for satellite-to-home television service that militate against its approval. However, we have recently held that the use of fixed-satellite service transponders in the 12 GHz band to provide satellite-to-home television service is not contrary to our public interest mandate under the Act. *See GTE Satellite Corporation, supra*, and *First Report and Order, supra*. We find no new arguments raised by USSB in this regard. The lower power of the SBS satellites appears to require somewhat larger receiving antennas than we have previously considered. However, the potentially higher cost of such antennas is more likely to restrict NSTL's customer base, and thus its viability, rather than adversely affecting customers. Antennas initially purchased for use with SBS satellites will be usable with another program supplier in the band. Moreover, such antennas do not appear to be in conflict with our orbit spacing criteria in these bands. Furthermore, we do not believe that the proposed transmission parameters constitute inefficient use of the orbit/spectrum resource. While USSB's technical arguments are relevent to the design of DBS satellites in the 12.2 - 12.7 GHz band, they are not necessarily the criteria of efficient fixed-satellite spacecraft designs in the 11.7 - 12.2 GHz band. Having already approved the SBS satellite design, we are reluctant to preclude any particular type of transmissions carried over these satellites that are compatible with our satellite spacing criteria. USSB has not demonstrated that the criteria it advances, which may be appropriate for DBS in the 12.2 - 12.7 GHz band, should also be imposed at this time on domestic fixed-satellites that operate in another frequency band.

14. USSB also asserts that these services should be classified as broadcasting to conform to determinations made in General Docket No. 80–603 which established policies for experimental Direct Broadcast Satellite (DBS) systems. In that proceeding, we deferred final determination of whether subscription DBS services should be classified in a manner similar to subscription television (STV), and, hence, be regulated as a broadcast service, or whether to adopt a "hybrid" (non-broadcast) classification, as we treat certain new terrestrial services that provide subscription direct-to-home service, such as FM subcarrier SCAs. Pending a final determination, we

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[4] USSB also attempts to reargue many of the legal questions decided in the *Transponder Sales Order*. However, this order is not appropriate for reconsideration of that decision, and we therefore do not address these portions of USSB's petition.

stated that broadcast DBS licensee subscription services would be classified as broadcasting for the interim.[5] However, the Commission determined that, initially at least, common carrier DBS licensees and their programmer customers would not be subject to broadcast regulations. Subsequently, in *GTE Satellite Corporation*, *supra*, we also indicated that services provided by domestic satellites would be regulated in a manner consistent with the policies adopted for experimental DBS services. Further, we did not consider in *GTE Satellite Corporation* whether any technical differences between domestic fixed satellite and DBS services might provide a basis for different regulatory treatments. In this connection, we do recognize that while the technical specifications for DBS may facilitate broad entry into the direct-to-home market, a lower power service such as the one proposed by NSTL, like some other "hybrid" services, is likely to be constrained by its lower technical quality and more limited reception area as compared to planned DBS transmissions.[6]

15. We need not decide here, however, if technical or other differences would constitute a basis for applying different regulatory policies to these services. Instead, we have decided to re-examine in future proceedings our past classification decisions for DBS, STV and other similar types of subscription services as necessary. Consequently, we believe an approach which treats the subscription service proposed here as a "hybrid" with respect to the imposition of regulatory obligations imposed on traditional broadcast licenses comports with the direction of previous Commission decisions and appears likely to be a sound regulatory policy. Given the inconsistencies that have arisen in the course of our past decisions concerning the regulatory treatment of various subscription services and the likely direction of our future policies in this area, we believe it would be inappropriate to determine herein that the service under consideration should be classified and regulated as broadcasting. We believe that the legal, technical and other aspects of our regulatory classifications of such services should be thoroughly explored. Such a

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[5] *See Direct Broadcast Satellites*, 90 FCC 2d 676 (1982). A broadcast DBS licensee is one that chooses to operate as a broadcaster and/or "proposes to provide direct-to-home service and retains control over the content of the transmissions. . . ." 90 FCC 2d 676 at 709.

[6] There are of course some similarities between broadcast licensee DBS service and the NSTL proposal. However, the technical differences are significant: the SBS III satellite is designed to operate at 1/10th the power of the proposed DBS satellites, and the antennas used by NSTL will be almost twice the size of those proposed for DBS. Consequently, we believe the instant service proposal bears a greater resemblance to the "hybrid"-type services describe above than it does to broadcast licensee DBS service. *See Memorandum Opinion and Order* in Docket 19761, *infra*, at n. 29; *see also Report and Order* in BC Docket No. 82–536, FCC 83–154 (released May 19, 1983) (*Subsidiary Communications Authorizations*) *Report and Order* in BC Docket No. 81–741, FCC 83–120 (released May 29, 1983) (*Teletext*); *Compare Subscription Television 4th Report and Order*, 15 FCC 2d 466 (1968).

wider review of our past classification practices is better handled in a more general rulemaking proceeding than a specific facility authorization decision.

16. With respect to the application now before us, we recognize that the NSTL proposal contains some of the attributes associated with traditional broadcast services. However, it is not being offered by a broadcast licensee, and the signal will be scrambled and is to be received only by paying customers who have obtained decoding equipment from NSTL. As such, NSTL's transmissions would not be intended for the general public. While exhibiting characteristics of both broadcasting. *See Memorandum Opinion and Order* in Docket No. 19671, FCC 83–245 released June 23, 1983; *WFTL Broadcasting Company*, 45 FCC 2d 1152, 1153–54 (1974); *See also Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 165 (1980) and *National Subscription Television v. S & H TV*, 644 F.2d 820, 824 (1981). Consequently, we are not convinced that it would be appropriate to burden NSTL with broadcast obligations at this time.

17. Finally, there has been some argument that this transaction should be disapproved because NSTL is affiliated with a foreign company. We see no reason to consider here the foreign ownership requirements of Section 310 of the Communications Act, 47 U.S.C. §310, because NSTL is not and will not be a Commission licensee with regard to this service. In the *Transponder Sales Order*, we concluded that the acquisition of rights to a particular transponder, including ownership rights, does not constitute a transfer of control because the "user has no means to control the facility's power or transmissions." 90 FCC 2d at 1258. As was the case with the other noncommon carrier transponder transactions, SBS will retain control of the licensed facility after the contract is executed. If we were to disapprove this transaction on the basis of alien ownership requirements, it would seem that we would also have to preclude any foreign entity from leasing transponders on a domestic fixed-satellite for purposes of distributing programming to numerous cable systems throughout the country.[7]

Conclusion

18. In view of the foregoing, we find that the grant of this application is consistent with our *Transponder Sales Order* and will serve the public interest, convenience and necessity. Moreover,

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[7] At present several foreign controlled entities are involved in distributing program services to cable systems including Telefrance and Reuters, Ltd. Others sell foreign programming to U.S. owned programming services who in turn distribute their product to cable systems. The delineation between any of these services or their preclusion would not seem to serve the purposes of Section 310(b) because none of these programming services control the operational aspects of a valuable communications facility.

petitioner has not demonstrated that public interest detriments are likely to result from a grant of this application.

19. Accordingly, IT IS ORDERED that Application File No. 1091-DSS-MP/ML-83 IS GRANTED and Satellite Business Systems IS AUTHORIZED to offer five transponders on its SBS III domestic satellite on a noncommon carrier basis as proposed in its application.

20. IT IS FURTHER ORDERED that the Petition to Deny filed by United States Satellite Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Application of Satellite Business Systems for Modification of Domestic Fixed-Satellite Space Station Authorization to Permit Non Common Carrier Transponder Transactions

I dissent to that part of this Memorandum Opinion, Order and Authorization which declines to regulate NSTL as a broadcaster consistent with Section 153(o) of the Communications Act.[1]

The majority recognizes "that the NSTL proposal contains some of the attributes associated with traditional broadcast services"[2] but finds that it would be inappropriate to classify NSTL's service as broadcasting for three reasons: first, the service is not being offered by a broadcast licensee; second, the service is being offered on a subscription basis and thus, is not intended for the general public within the meaning of Section 153(o);[3] and third, NSTL's proposal is a "hybrid" offering, which the FCC has the discretion to exempt from Title III broadcast regulation in any event.[4]

With all due respect, the majority's first "reason" merely begs the question at issue here. As to the second reason, the majority provides neither analysis nor precedent to support the view that NSTL's service is not within the statutory definition of broadcasting. The majority cites cases concerning the applicability of 47 U.S.C. § 605 to subscription television,[5] but these cases do not squarely address the question of whether subscription television is broadcasting for purposes of Section 153(o). Nonetheless, the Ninth Circuit's analysis in *NST* (a case relied on by the majority) severely undermines the argument that subscription television is not Section 153(o) broadcasting.[6] More directly relevant to the issue at hand—but unfortunately not addressed by my colleagues—is the Commission's longstanding classification of subscription television as broadcasting even though STV signal reception is limited to paying subscribers.[7] From the standpoint of regulatory classification, there is no tenable distinction between NSTL's service and conventional subscription television. Therefore, the majority's determination that NSTL's subscription service is not broadcasting is clearly erroneous.

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[1] *See* 47 U.S.C. § 153(o). Section 153(o) defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

[2] *Memorandum Opinion, Order and Authorization* at paragraph 16.

[3] The majority cites *Chartwell Communications Group* v. *Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980) (*Chartwell*) and *National Subscription Television* v. *S&H TV*, 644 F.2d 820, 824 (9th Cir. 1981) (*NST*) in support.

[4] The majority cites this Commission's order in Docket 19671 and *WFTL Broadcasting Co.*, 45 FCC 2d 1152, 1153–54 (1974) in support.

[5] Section 605 protects radio communications from unauthorized reception and

The majority's alternative argument that NSTL is providing a "hybrid" service which need not be classified as broadcasting is also seriously misguided. At the same time it calls for a proceeding to reexamine the classification issues implicated by this case, the majority mistakenly concludes that it has the discretion to classify NSTL's proposal in whatever manner it chooses. The fact is that the Commission has already established classification guidelines governing NSTL's service. In the *DBS Report and Order*, we established an interim service classification scheme for broadcast satellite service.[8]

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disclosure. However, transmissions intended to be received by the general public are not protected. The courts have found that a transmission which meets the definition of broadcasting specified in Section 153(o) can still be protected by Section 605. *See NST, supra,* 644 F.2d at 824.

[6] In *NST, supra,* the Court of Appeals for the Ninth Circuit observed: We think that an individual might "broadcast"—i.e., transmit a signal over the airwaves with the intent that it be received by the public within the meaning of Section 153(o)—without such broadcasting [losing the protection afforded by Section 605]. For example, the operator of an STV service offers his product to any member of the public willing to pay the subscription price. Like any entrepreneur, the STV operator hopes that his product becomes popular and is subscribed to by most if not all of the public. Thus, the programming of STV is calculated to attract the largest possible audience, and the method of transmitting STV is premised on being able to accommodate widespread demand. It is in this sense that STV is "intended to be received by the public"—i.e., "broadcast"—under Section 153(o). *See generally In re Amendment of Part 73 supra. See also Functional Music, Inc.* v. *FCC,* [274 F.2d 543 (D.C. Cir. 1958)]. *NST supra,* 644 F.2d at 824.

[7] *See Amendment of Part 73 to Provide for Subscription Television Services,* 3 FCC 2d 1, 8–9 (1966); *Subscription Television Fourth Report and Order,* 15 FCC 2d 466, 472–73 (1968). In classifying STV as broadcasting, the Commission stated: "[W]e regard intent to provide a radio or television program service without discrimination to as many members of the general public as can be interested in the programs as of primary importance. . .. [I]ntent may be inferred from the circumstances under which the programs are transmitted and. . . the number of actual or potential viewers is not significant." *Id.* at 472. *Cf. Functional Music, Inc.* v. *FCC,* 274 F.2d 543 (D.C. Cir. 1958) (reversing FCC ruling that background music subscription service was not broadcasting; declaring service within Section 153(o)).

[8] *See Direct Broadcast Satellites* 90 FCC 2d 676 (1982). In adopting interim regulatory policies, the Commission postponed action on a proposal to classify subscription television as a hybrid service.

We later made clear that these guidelines apply to the provision of direct-to-home satellite service in the fixed satellite spectrum.[9] As explained below, under established guidelines, NSTL's service must be classified as broadcasting.[10]

The Commission's interim regulatory classification guidelines contemplate two broad categories of service providers: (1) the facility operator who retains control over the transmission content; and (2) those who offer their transmission facilities indiscriminately to the public under tariff for direct-to-home service by programmer-customers.[11] The former class of providers are deemed to be broadcasters and are subject to the broadcasting provisions of the Title III, regardless of whether the service is provided on a subscription basis.[12] The latter are common carriers and they will be regulated pursuant to the requirements of Title II.[13] A carrier's programmer-customers are exempt from all regulation. In declining to impose broadcast regulation on programmer-customers, the Commission reasoned that the Communications Act does not require such regulation and that imposing Title III requirements on programmer-customers would be redundant with the Title II obligations imposed on the common carrier from whom the programmer-customer is obtaining its facilities pursuant to tariff.[14]

SBS' proposal to dispose of the five transponders on a non-common carrier basis does not fall within either category of service provider. However, removal of the transaction from the ambit of common carrier regulation eliminates any argument that the transaction need not be governed by Title III (broadcast) because Title II's (common carrier) access provisions apply; in fact, such removal argues strongly in favor of imposition of Title III requirements *because* Title II's access provisions do not apply.

In sum, under existing precedent, NSTL must be classified as a broadcaster and must comply with the broadcasting provisions of Title III. Fidelity to the rule of law and maintenance of respect for administrative process require that this agency adhere to its regulatory policies until it changes them after proper opportunity for notice and comment. In this case, the majority has improperly ignored the policy determinations made in the *DBS Report and Order* and in the *GTE Satellite Corp. Reconsideration* Order. In so doing, it further muddles an already tenuous regulatory scheme. I dissent.

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[9] *See GTE Satellite Corporation Reconsideration Denied*, FCC 83–271 (released June 23, 1983) Fn. 31. *See also Memorandum Opinion, Order and Authorization* at paragraph 14. The majority's suggestion that application of DBS classification guidelines to lower power direct-to-home satellite service may be inappropriate because there are technical differences between the two services is logically unpersuasive and without precedential support.

[10] Even if this were not so, the authority relied upon by the majority to support the hybrid service determination is entirely unpersuasive.

[11] *See Direct Broadcast Satellites, supra*, 90 FCC 2d at 709.

[12] In this regard the Commission ruled that "if broadcast services are provided on a subscription basis, they will still be classified as broadcast services until and unless the Commission determines otherwise." *Id.*

[13] *Id.*

[14] With the benefit of hindsight, the legality of this approach seems open to question. *Cf. Report and Order* in Docket Nos. 80–112 and 80–116 (Dissenting Statement of Henry M. Rivera).

CATV Carriage, Mandatory Signal
Review, Application for

Application for review of delegated action denying reconsideration of prior grant of conditional waiver of signal carriage rules denied. Translator has failed to rebut showing of unsable signal. –*Wentronics, Inc.*

FCC 83-524

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re:

WENTRONICS, INC. Casper, Wyoming	CSR-1795 WY0011
Application for Review	

MEMORANDUM OPINION AND ORDER

(Adopted: November 8, 1983; Released: November 16, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. On April 1, 1983, Hi Ho Television of Wyoming, Inc. (hereinafter "Hi Ho"), licensee of Television Translator Station K20AB (Channel 20), Casper, Wyoming, filed an "Application for Review" of the action taken by the Chief of the Mass Media Bureau pursuant to delegated authority in *Wentronics, Inc.* (Casper, Wyoming), Mimeo No. 2673 (released March 2, 1983) (hereinafter "*Wentronics II* "), denying its petition for reconsideration. Wentronics, Inc. (hereinafter "Wentronics"), operator of a cable television system serving Casper, Wyoming, and neighboring communities, has opposed Hi Ho's application.

2. On July 10, 1980, Wentronics filed a petition for special relief, seeking a waiver of Section 76.59(a)(5) of the Commission's Rules, which would otherwise obligate Wentronics to carry Hi Ho's signal on Wentronics' cable system. In support of its petition, which Hi Ho opposed, Wentronics raised several arguments, including a challenge to Hi Ho's signal quality and reliability. While the Bureau Chief rejected most of Wentronics' arguments, its arguments concerning Hi Ho's signal quality were accepted.[1] Wentronics was granted a temporary waiver of Section 76.59(a)(5) of the rules, until Hi Ho established that it placed a usable signal over Casper, Wyoming,

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[1] Wentronics' arguments concerning K20AB's signal quality were made in supplemental filings, submitted after K20AB began operations.

where Wentronics' headend is located. *Wentronics, Inc.* (Casper, Wyoming), Mimeo No. 137 (released October 13, 1982) (hereinafter "*Wentronics I*").

3. In seeking reconsideration of *Wentronics I, supra*, on November 12, 1982, which Wentronics opposed, Hi Ho argued that the Bureau Chief relied upon improperly filed pleadings, and that Hi Ho is not required to make the signal quality showing required of it by the Bureau Chief. The petition for reconsideration was denied because, as the Bureau Chief noted: (1) Wentronics' filings were proper; (2) Hi Ho did not substantively rebut these filings nor Wentronics' further showing that K20AB's signal was unusable and subject to outages; and (3) the showing required of Hi Ho was in accord with Commission precedent and was authorized by the Commission's Rules. *Wentronics II, supra*.

4. In support of its "Application for Review," Hi Ho argues that the location of Wentronics' headend is unknown, and that Hi Ho cannot determine what constitutes the "usuable signal" which it is required to provide. Hi Ho again contends that Wentronics' 1982 supplemental submissions were filed in violation of the Commission's rules and urges the Commission to clarify the two prior delegated orders.

5. Following a request for extension of time,[2] Wentronics opposed Hi Ho's application on April 21, 1983. Wentronics argues that the prior delegated orders are quite clear in what they require of Hi Ho. In addition, Wentronics contends that Hi Ho's "translator . . . even now continues to be absolutely unreliable with lengthy outages and poor quality signal." Wentronics supplemented its opposition on April 28, 1983, submitting a log of the operational failures of Hi Ho's translator during the period March 18-April 13, 1983.

6. Hi Ho's arguments on review are not persuasive. The obligation of parties to special relief proceedings to maintain the continuing accuracy and completeness of their filings pursuant to Sections 1.65 and 76.7 of the Rules is settled. *E.g., Teleprompter Corporation*, FCC 82-109, 89 FCC 2d 417, 435-436 (1982), *appeal dismissed*, No. 81-1915 (D.C. Cir. Nov. 12, 1981), *appeal dismissed*, No. 82-1441 (D.C. Cir. Jan 26, 1983); *Post-Newsweek Stations, Florida, Inc. (WPLG-TV)*, FCC 74R-365, 49 FCC 2d 92, 94 (1974).[3] Wentronics' supplemental filings fall within these parameters and were properly accepted and considered by the Bureau. In addition, Hi Ho has yet to rebut substantively Wentronics' showing of the technical inferiority of Hi Ho's translator's operation. Indeed, Hi Ho has conceded the "less than optimum quality" of its signal. *See Wentronics I, supra* at para.

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[2] This request was occasioned by an inadvertent failure by Hi Ho to serve a copy of its application on counsel for Wentronics.

[3] In fact, Hi Ho itself submitted an update filing in the *Wentronics I* proceeding. *Wentronics II, supra* at n. 4.

13. Hi Ho's assertions notwithstanding, it is established by a map which is record evidence that Wentronics' headend is located within the City of Casper, *see Wentronics II, supra* at para. 5, the very city Hi Ho is licensed to serve. Accordingly, we find that the Bureau Chief did not err in granting Wentronics a conditional waiver, pending a showing by Hi Ho "that it places a usable signal over Casper, Wyoming, and Wentronics' headend," *Wentronics I, supra*, at para. 13 (citation omitted), nor in denying reconsideration. *See, e.g., American Video Corporation* (Pompano Beach, Florida), FCC 77-642, 69 FCC 2d 1441 (1978), *modified on recon.*, FCC 79-216, 71 FCC 2d 427 (1979).

7. In view of the foregoing, we find that grant of Hi Ho's "Application for Review" is not in the public interest.

8. Accordingly, IT IS ORDERED, That the "Application for Review" filed April 1, 1983, by Hi Ho Television of Wyoming, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Rate Structure, Inquiry
Common Carrier, Rates, Just and Reasonable Charges
Initial Decision, Modified by Commission
Rate, of Return
Tariff, Investigation

Initial Decision of ALJ modified by Commission disposition of parties' exceptions. ALJ erred in finding rate levels and rate structure unlawful. First phase of tariff investigation terminated. Rate of return prescription vacated.
–*Western Union Telegraph Co.*
CC Docket No. 78–97

FCC 83–478

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY Revisions to Tariffs F.C.C. Nos. 240 and 258 filed with Transmittal No. 7346; Tariffs F.C.C. Nos. 268 and 269 filed with Transmittal F.C.C. Nos. 7347 and 7348; Revisions to Tariffs F.C.C. Nos. 229, 240, 254, 255, 258, 260, 263 and 268 filed with Transmittal No. 7417.	CC Docket No. 78–97 (Phase I)

FINAL DECISION

(Adopted October 19, 1983; Released October 28, 1983)

BY THE COMMISSION:

1. Before the Commission are exceptions to the Initial Decision (ID) of the Administrative Law Judge in Phase I of this case (FCC 82D-14, released March 10, 1982) filed by The Western Union Telegraph Company (Western Union), the international record carriers (IRCs),[1] and the Separated Trial Staff of the Common

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[1] The IRCs, comprised of FTC Communications, Inc. (FTCC), ITT World Communications Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA Globcom) TRT Telecommunications, Inc. (TRT), and Western Union International, Inc. (WUI), have filed joint exceptions and a joint reply to the exceptions of Western Union. American Facsimilie Systems, Inc. (AFSI), an intervenor in this proceeding that competes with Western Union Permit Service (WUPS), a non-regulated truck

Carrier Bureau (Trial Staff). After lengthy proceedings concerning Western Union's Telex and TWX rates in effect from August 1978 to April 1981, the ID concluded, *inter alia*, that: (1) the rates were unjust and unreasonable; (2) the rate structure was unreasonably discriminatory in that it accorded more favorable rate treatment to long-haul customers than to short-haul customers; and (3) cost savings associated with IRC-interconnected traffic warranted a rate differential between service provided to the IRCs and public domestic customers, amounting to a 25 percent discount for the IRCs. The ID also ordered Western Union to pay refunds to the IRCs and other customers because the charges paid by these customers for short-haul transmission services during the review period were too high. Western Union excepts to the ID in its entirety. The IRCs' exceptions concern only the interest rate to be applied to the overcharges. The Trial Staff questions the thoroughness of the ID's analysis of the discount and refund issues, but otherwise supports the result. For reasons explained below, our analysis of the record leads us to conclusions which differ significantly from those reached in the ID. Accordingly, the ID, in large part, will be set aside.[2]

I. *Background*

A. Description of Services

2. Western Union offers two integrated teleprinter exchange services—Telex and TWX—which provide for the transmission of typewritten and data communications between subscriber stations. Subscribers of both services are listed in a common directory and are offered ancillary services provided via the carrier's Infomaster computer. Consequently, TWX and Telex subcribers can send messages to virtually anyone in the world; can send a single message to multiple addresses; can send messages from TWX to Telex subscribers, and *vice versa*, both on a prepaid and collect basis; and can send domestic and international telegrams and Mailgrams.

3. TWX is a higher speed service, operating at speeds up to 100 words per minute, whereas Telex operates at up to 66.67 words per minute. In addition, Telex uses Baudot code while TWX uses the ASCII code, the latter having a greater data capacity. Although Telex and TWX serve largely the same clientele, *i.e.*, the business community, and are used for the transmission of both typewritten

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permit service, has also filed a reply. In a related formal complaint against Western Union (File No. TS 11–78), AFSI contends that Telex/TWX operations improperly cross-subsidize WUPS. Commission action on the complaint has been deferred pending a final decision in Docket No. 78–97. Graphnet, Inc. (Graphnet) has filed a request for refunds. Western Union has also filed a request for oral argument.

[2] We also deny Western Union's request for oral argument on the exceptions. We find that the issues and the parties' positions are adequately presented in the exceptions and would not be clarified by oral argument.

messages and low speed data, Telex is the more message oriented-service while TWX is better suited to the transmission of low speed data.

4. The standard terminal in use for both Telex and TWX is a teletypewriter. Terminals may be obtained from Western Union for a monthly charge, owned outright by customers, or leased from a terminal retailer. Computers and other business machines may also be connected to the TWX and Telex network.

5. The Telex and TWX rate structures are also similar, each consisting of basic monthly charges for terminal equipment,[3] network access and usage. Subscribers located within designated access cities pay a "local" network access charge for the facilities and associated services which allow them to reach the Telex and TWX inter-exchange networks. Subscribers located beyond the boundaries of access cities are served with a "remote access line," for which an additional charge is assessed. Prior to the rates under investigation, Western Union's rates for Telex *usage* were based on a distance-sensitive, zonal concept. There were twelve geographic zones and four rate steps. Charges varied depending on the number of zones traversed. For TWX, usage rates were also distance sensitive, based on eleven mileage steps. Under the tariff revisions at issue, the number of Telex usage rate steps was reduced from four to three and the range of rate differentials was compressed from a range of 17.7 cents to 60 cents under the previous rates, to 22.5 cents to 52.5 cents under the new rates. For TWX, the milage steps were reduced in number from eleven to five and the rate-per-minute range was reduced from 20 cents to 50 cents per minute to 30 cents to 52 cents per minute. According to Western Union, the new rates were filed to bring the Telex and TWX rate structures into closer correlation with costs, particularly, the cost of serving long-haul and short-haul customers.[4]

B. Procedural History

6. The issues in this proceeding were set out by the Commission in a series of designation orders in response to petitions challenging Western Union Telex and TWX tariff filings. The controversy began with Western Union's December 1, 1977 filing of proposed revisions

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[3] Pursuant to Commission order, terminal equipment has been detariffed. *See*, Amendment of Section 64.702 of the Commission's Rules and regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F. 2d 198 (D.C. Cir. 1982).

[4] In addition, Western Union sought to improve the relationship between its Telex and TWX rate structures and the rate structures of services of other carriers, particularly American Telephone and Telegraph Company's (AT&T) "dataphone" service, which is provided over AT&T's Public Switched Telephone network and which Western Union viewed as a substitute for Telex and TWX. *See*, Western Union Ex. 5, pp 20–23. *See also*, paras. 75, n. 33, *infra*.

to its Tariffs F.C.C. Nos. 240 and 258, under which the carrier offers domestic Telex and TWX service, respectively, to the general public. On December 2, 1977, in anticipation of the termination of settlement agreements between Western Union and the IRCs covering the division of charges for jointly provided overseas Telex and TWX services, Western Union filed proposed Tariffs F.C.C. Nos. 268 and 269, which would have applied the same rates to the IRCs as were proposed in the December 1 rate filing. The December 1 filing contained the following proposals:

> (a) A reduction in the number of rate bands (Telex) and mileage bands (TWX), with comparable changes for services utilizing Western Union's Infomaster Computer switching system.
>
> (b) Changes in the levels of usage rates for Telex and TWX services. Generally, the short-haul rates were increased and the long-haul rates were decreased.
>
> (c) An increase in the TWX remote extension charge.
>
> (d) An increase in the charges for additional directory listings.

7. In response to a petition to suspend filed by WUI, the Commission issued its first designation order in Docket No. 78–97, suspending these revisions for the maximum statutory period, setting them for investigation and imposing an accounting order.[5] The Commission's primary concern was that the proposed rates might result in excessive Telex and TWX earnings which in turn could be used to cross-subsidize losses or deficient returns on other Western Union services. In 1971, the Commission had prescribed Telex and Telex-related rates calculated to yield a pre-tax rate of return of 18.92 percent as the maximum just and reasonable rates for these services to enable Western Union to modernize its plant and operations, to develop facilities required to transfer TWX from AT&T facilities to Western Union facilities, and to bolster deficient PMS earnings. *The Western Union Telegraph Co.*, 27 FCC 2d 515, 531 (1971). Three years later in Docket No. 19696, the Commission considered subsequent changes to Telex/TWX rate levels and structure. There, the Commission concluded that Western Union's pre-tax rate of return under the rates prescribed in 1971 had fallen substantially below 18.92 percent. Also because Western Union's modernization and TWX integration programs were still in progress, the Commission found that the 18.92 percent pre-tax rate of return should be left in place. *The Western Union Telegraph Co.*, 49 FCC 2d 532, 549 (1974).

8. However, under the rates now at issue, projected 1981 pre-tax Telex earnings would exceed 25 percent, while projected pre-tax TWX earnings for that year approached 19 percent. Under the same proposal, Western Union's projected company wide pre-tax rate of

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[5] The Western Union Telegraph Co., 67 FCC 2d 1420 (1978) (Public Telex/TWX Order).

return ranged from 5 percent in 1978 to 8.8 percent in 1981. 67 FCC 2d at 1424. While the Commission recognized the need of carriers to adjust rates and rate structures to meet the competitive offerings of other carriers, the Commission was concerned that the projected Telex/TWX returns could be "well beyond that required to reasonably support these services." *Id.* Thus, on the basis of these figures, it appeared to the Commission that "Western Union is using high returns on Telex/TWX services to offset, wholly or in part, losses or deficient returns incurred on PMS (Public Message Service), Mailgram, and various competitive services, as well as some non-communications services." *Id.* While the Commission acknowledged that "some subsidization between and among services might be found to serve the public interest, particularly with respect to PMS (as we have found previously in Docket No. 19696)," it believed that such a determination should be made by the Commission on the basis of a full public record, not by the carrier. *Id.* The Commission noted that the estimated 1978 operating results provided in Western Union's Section 61.38 data showed a -9.5 percent return for PMS, a 2 percent return for Mailgram and a -0.2 percent return for "all other services", which included private line, satellite and non-communications services". *Id.* at n. 8. Similar returns were projected for these service categories throughout the review period. The Commission also questioned Western Union's cost allocation procedures.

9. In its December 2, 1977 filing, Western Union proposed to eliminate the rate discount which had been accorded the IRCs under the settlement contracts and establish rates for the domestic haul of interconnected overseas calls equal to the public domestic rates filed on December 1. In seeking rejection or suspension of these tariffs, the IRCs made three primary claims. First, they argued that Western Union's costs of providing service to the IRCs were substantially below the costs of providing service to the public. Accordingly, the IRCs claimed they were entitled to a rate discount proportionate to the alleged cost savings associated with IRC-interconnected Telex and TWX services. The IRCs' second argument focused on the proposed increased rates for short-haul Telex and TWX usage. They claimed that because the distance of the Western Union Telex/TWX landline segment to international gateways was at that time generally short-haul in nature, the IRCs would experience unreasonably high rate increases in relation to domestic subscribers having a greater mix of short-haul and long-haul needs. Their third claim was that the proposed rates lacked an underlying division of charges agreement between Western Union and the IRCs and, therefore, were in violation of former Section 222(e)(1) of the Communications Act.[6]

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[6] Former Section 222 in relevant part, required that Western Union distribute among the IRCs record traffic "destined to points outside the continental United

10. Ruling on the IRC petitions in its second designation order in this proceeding,[7] the Commission tentatively concluded that the alleged cost differences were minor from an overall systems point of view and did not significantly effect the important cost determinants of trunk engineering, switching configuration, or network routing. Other than the normal customer-to-customer differences in community of interest, calling patterns and geographic dispersion, the Commission found no basis for concluding that a call which transits the domestic switched network for ultimate connection with an overseas terminal has cost functions inherently different from those which are destined to points within the contiguous forty-eight states. 68 FCC 2d at 116. However, because the general questions of lawfulness which had been raised with respect to the public tariffs were also at issue with respect to the IRC tariffs, the Commission enlarged the proceeding to allow consolidated investigation of public and IRC-interconnected Telex and TWX services. *Id.* at 119–120, 123–24. Moreover, notwithstanding its initial conclusion with respect to the cost savings issue, the Commission designated this issue for investigation as well, since there had been some differential rate treatment of public and IRC traffic during the period IRC rates were governed by contract. Specifically, the Commission questioned "whether any such cost differences found to exist are of such magnitude as to render unreasonable WU's practice of averaging these costs over its public and IRC customers." *Id.* at 123. However, "(i)n recognition of the public interest considerations which may favor some degree of cost-averaging," the Commission required that "the IRCs first demonstrate a likelihood of substantial cost differences in providing public and IRC service before requiring WU to submit disaggregated data." *Id.* at n. 41.

11. In that same designation order, the Commission also noted the IRCs' contention with respect to the proposed short-haul rates and expressed its own concern that "the proposed changes in rate structure, as applied to Telex and TWX services overall, may contain an unlawful discrimination between short-haul and long-haul use. . ." Because this question existed with respect to both the public and IRC tariffs, the Commission included the short-haul/long-haul controversy as a separate issue for investigation. As a related and additional matter, the Commission required that Western Union also substantiate its claim that Telex and TWX rates would be more

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States" and divide the charges for such traffic pursuant to an equitable formula agreed upon by the interested carriers and approved by the Commission. In the event that the parties failed to agree, the Commission after notice and hearing, was empowered to prescribe such a formula. Section 222 was amended in its entirety by the Record Carrier Competition Act of 1981, P.L. 97–130, 95 Stat. 1687, (RCCA).

[7] The Western Union Telegraph Co., 68 FCC 2d 98 (1978) (IRC Telex/TWX Order), *reconsideration denied*, 69 FCC 2d 924 (1978), *appeal dismissed*, 652 F.2d 136 (D.C. Cir. 1980).

closely aligned with costs under the new rate structure than under the existing structure. *Id.* at 120.

12. The Commission ruled that Section 222 applied only to outbound overseas traffic and that, to the extent the rates for such traffic would have been set by unilateral tariff filing, rather than by negotiated agreement or Commission prescription, rejection of Western Union's filing was required. *Id.* at 118. Accordingly, the Commission added as an issue in the investigation what formula for the division of charges for outbound IRC-interconnected Telex/TWX services it should prescribe. *Id.* at 124. On the other hand, the Commission found that inbound overseas traffic did not come within the purview of Section 222. However, because the proposed tariff provisions covering inbound traffic raised questions of lawfulness similar to those raised by Western Union's public domestic tariff filing, the inbound IRC-interconnected tariff provisions were added to the ongoing investigation and suspended for a period coterminus with the suspension period ordered in the *Public Telex/TWX Order*. *Id.* at 119–20.

13. In subsequent negotiations outside of the rate hearing context, the IRCs and Western Union agreed upon a formula that would have given the IRCs a discount from the rates applicable to domestic public service.[8] However, the Commission rejected the agreement out of concern that it "unduly favor[ed] the IRCs *vis a vis* W[estern] U[nion]'s public domestic users of the same Telex and TWX services." *The Western Union Telegraph Co.*, 71 FCC 2d 621, 628 (1979).

14. Instead the Commission urged the IRCs and Western Union to try again to agree upon a formula that would receive Commission approval as just, reasonable, equitable and in the public interest and nondiscriminatory. In the event the parties failed to reach agreement, the Commission said it was prepared to prescribe interim charges in this proceeding and delegated to the ALJ its authority to do so "if warranted by the circumstances at the time."[9]

15. When the parties reported to the ALJ that they could not agree, the ALJ issued an interim prescription order requiring the IRCs to pay Western Union for its provision of the landline haul of overseas Telex service essentially the same charges that public domestic users pay for equivalent service.[10]

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[8] The agreement was conditioned upon the Commission's acceptance of both the formula for divisions and the deletion of issues relating to division of international charges from the investigation in Docket No. 78–97. Under its terms, the agreement governed outbound charges from January 1, 1978 through December 31, 1979 and was terminable after January 1, 1980 on sixty days' notice.

[9] 71 FCC 2d at 630–31, n. 14.

[10] The Western Union Telegraph Co., FCC 79M-845, released July 24, 1979, *application for review dismissed*, The Western Union Telegraph Co., FCC 79–812, released December 13, 1979.

16. On June 30, 1978, Western Union filed further revisions to its Telex and TWX tariffs which, according to Western Union, reflected substantial increases in leased facilities costs occasioned by the termination of certain AT&T-Western Union exchange of facilities agreements. Although the Commission found no grounds for rejection or suspension, these revisions were automatically included within the scope of this proceeding in accordance with the original designation order. 69 FCC 2d 924 (1978).

17. On January 9, 1981, Western Union filed distance insensitive or "postalized" Telex and TWX rates for both the public and the IRCs which became effective on April 24, 1981 *The Western Union Telegraph Co.*, Mimeo No. 000522, released April 30, 1981, 46 Fed. Reg. 26,169 (1981), *application for review granted in part, petition for reconsideration denied*, 89 FCC 2d 538 (1982). These revisions were also automatically included in the ongoing investigation. Prior to the postalized filing, Telex and TWX usage rates had been based, in part, on distance. *See*, para. 5, *supra*. However, because the postalized rates were premised on the use of satellite transmission and computerized switching technology, distance (*i.e.*, length of haul) was assertedly no longer a significant cost factor in the provision of Telex and TWX service. Accordingly, under the postalized rate structure, subscribers pay the same rate regardless of the distance a message travels between its points of origination and termination. Because the postalized tariffs were founded on different facilities and a different rate structure, the ALJ bifurcated the investigation. *See*, *The Western Union Telegraph Co.*, FCC 81-1548, released May 18, 1981. Thus, Phase I concerns the Telex and TWX rates in effect from August 1978 to April 1981. Phase II deals solely with the postalized rates. However, because no rate structure issues were raised by the postalized rate filing, such issues were excluded from Phase II, leaving the issues of rate level, rate of return and rate averaging. *See*, 89 FCC 2d at 542–43. The Phase II proceedings were deferred by the Commission pending Commission ruling on the instant exceptions to the Phase I Initial Decision. *The Western Union Telegraph Co.*, FCC 82-310, released August 11, 1982.[11]

18. This case was originally assigned to Judge Reuben Lozner. He prescribed the interim rates which the IRCs were to pay. After the presentation of direct evidence by Western Union, discovery, and 37 days of hearings, the parties submitted their proposed findings of fact and conclusions of law. Before issuing an initial decision, however, Judge Lozner retired. The case was reassigned to Judge

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[11] On September 15, 1982, the IRCs filed a petition for modification of that order. Specifically, they seek resumption of Phase II on the theory that, pending deliberation on the exceptions to the Phase I ID, the Commission can complete the evidentiary record in Phase II or at least can require Western Union to file its direct case. However, since we are now ruling on the exceptions, that petition is moot.

Walter C. Miller, who concluded that the record was inadequate. The proceeding was reopened, and there followed a further round of exhibits, discovery, hearings and supplemental proposed filings and reply findings, after which Judge Miller issued his ID.

II. *Summary of the Initial Decision*

19. The ID concluded that Western Union had failed to demonstrate that its Telex and TWX rate revisions were reasonably related to costs. Indeed, the ID finds that Western Union neither knew nor cared what its Telex or TWX costs were by length of haul. Similarly, the ID found Western Union did not care that return levels for the Telex/TWX service elements—usage, terminals and access—varied so widely. Therefore, the ID rejected the proposed revisions because Western Union failed to justify Telex and TWX rates as just and reasonable under Section 201(b) of the Act. In addition, the ID found that Telex and TWX rates were unreasonably high during the review period. According to the ID, these rates resulted in excessive Telex and TWX earnings which were used to improperly cross-subsidize practically every other Western Union service offering.

20. The ID also rejected Western Union's cost data because it was based on system-wide operating results which included both interstate and intrastate operations. Since the rate revisions at issue concerned only interstate services, the ID found Western Union's submission inappropriate and unauditable.

21. Further deficiencies were found in Western Union's Telex revenue requirement. In this regard, the ID determined that Western Union grossly overstated the amount of Digital Exchange System (DES) network investment allocable to Telex service, thereby inflating the Telex rate base.[12] It found that Western Union included tax expenses even though its parent company paid no federal income tax in 1977 or 1978. Western Union's allocation procedures were criticized as being unsound and arbitrary.

22. The Telex and TWX rate revisions were also found to unreasonably discriminate against short-haul users. Noting that Western Union claimed that its costs of providing Telex and TWX service were distance insensitive, the ID concluded that the rates were sensitive to distance because short-haul users paid considerably more per mile than long haul users.

23. The ID also found that due to physical differences in the provisions of Telex/TWX service to the IRCs and the public, Western Union incurred lower costs handling IRC-interconnected traffic. Accordingly, the ID adopted new rates proposed by the IRCs which reflect a 25 percent discount from public rates to be applied to the domestic landline portion of IRC-interconnected traffic.

24. Moreover, on the basis of the above findings, the ID ordered

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[12] *See*, n. 17, *infra*, for a brief description of the DES network.

Western Union to refund to its short-haul customers the amount overcharged during the review period. It was found that the IRCs, as a group, were entitled to over $74 million, plus interest. Since the only evidence of Telex and TWX billing during the period was submitted by the IRCs, public customers had to make individual refund claims based on the difference between the rates at issue and the rates adopted by the ID (*see*, *ID*, Appendix C).

III. *DISCUSSION*

25. After reviewing the record, the ID and the exceptions, we conclude that the findings in the ID must be set aside. To assist in understanding our own analysis of the designated issues, we have organized the discussion in the following manner. We begin with a discussion of Western Union's ratemaking techniques and cost allocation methodology. Next we consider the adjustments to the Telex/TWX revenue requirement made by the ID, followed by a review of Telex/TWX earnings and the alleged use of those earnings to subsidize other Western Union services. We then turn to the ID's conclusions with respect to the Telex/TWX rate structure, particularly whether rates for short-haul Telex/TWX calls were unreasonably high in relation to rates for long-haul calls. After that, we discuss the ID's determination that the IRCs are entitled to a rate discount. Finally we review the ID's refund determination.

A. Western Union's Ratemaking Techniques and Cost Allocation

26. The ID's findings regarding Western Union's Phase I rate filing and its underlying cost allocation methodology are premised on the ALJ's interpretation that the Commission's designation order required that Western Union "justify its rate revisions under the standards (the Commission) laid down in Docket 18128." *ID*, para. 34. The ID concluded that Western Union did not satisfy the requirements of Docket No. 18128 because (1) it not only failed but never even attempted to develop the full cost of providing Telex and TWX services and didn't know or seem to care what Telex and TWX costs were in relation to distance or length of haul; (2) its marketing witness admitted the rates were "market oriented", (3) it failed to relate the Telex and TWX service elements to the cost of providing service, and (4) instead of establishing cost based rates Western Union simply tried to "align" its Telex and TWX rates with each other and with AT&T's Message Telecommunications Service (MTS). *ID*, paras. 34–39. Indeed, the ID found that because Western Union had "deliberately" employed the alignment theory which clearly violates established Commission policy and is patently illegal, there was "no need for any further inquiry" into the reasonableness of the Phase I rates. *ID*, paras. 39–40. The ID found that, even assuming further analysis of Western Union's rate submission had been in order, the carrier's cost support data was deficient because it was

based on "system-wide (*i.e.*, both interstate and intrastate) operating results." *ID*, para. 41.[13] On the basis of these findings, the ID concluded that Western Union's rate revisions were unreasonble and it gave only summary consideration to Western Union's cost allocation studies.

27. The ID's decision to basically disregard Western Union's presentation was, we believe, in error. In the first place, the ALJ read too broadly the Commission's reference to Docket No. 18128 in the first designation order. *See*, 67 FCC 2d at 1425. There the Commission found it necessary for Western Union to provide more detailed cost information in this proceeding to aid its analysis of Telex/TWX rates and the extent to which these services cross-subsidized other Western Union service offerings. Citing its *Second Order on Reconsideration* in Docket No. 18128, 67 FCC 2d 1441 (1978), the Commission explicitly stated that its specific prescription of Fully Distributed Cost Method 7 (FDC Method 7), to be employed by AT&T, did not apply to Western Union. *See*, 67 FCC 2d at 1444. On the other hand, the Commission noted that the development and adoption of those specific cost allocation requirements were founded on economic principles of general applicability, such as holding carriers accountable for their pricing and investment practices and concern about interservice cross-subsidization. Thus, because of these general principles and in light of Western Union's prior submission of FDC Method 7 data in connection with another proceeding, the Commission thought such data might be useful in the instant proceeding to examine the disparity between projected earnings for Telex/TWX and other Western Union services. Contrary to the ID's conclusion, the Commission did not intend to apply the specific requirements of Docket No. 18128 to the rates at issue here as the "sole basis and justification" of reasonableness. Docket No. 18128 principles were, in effect, borrowed simply as one way of gauging the reasonableness of Western Union's cost allocations to Telex/TWX.

28. Moreover, even if Western Union had been strictly required to meet the specific standards of Docket No. 18128, it is clear that the ID has misinterpreted those requirements. The ID's conclusion that the Phase I rates were not cost-based rested in large part on the fact that Western Union reported disparate earnings levels for each of the Telex and TWX service elements. Even for AT&T, Docket No. 18128 did not require that individual service elements earn at the same level as services overall or the company as a whole. In fact, Docket No. 18128 required only that the rates of return for AT&T's service categories achieve the rate of return deemed reasonable for

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[13] Because the ALJ's repudiation of Western Union's system-wide cost data lead to an adjustment of the carrier's revenue requirement, we will discuss that issue in the context of the ID's adjustments to the Telex/TWX rate base and expenses (paras. 56–60, *infra*).

the company as a whole. Of course this does not mean that a carrier is permitted to earn widely disparate rates of return on individual service elements. Simply put, such rates of return must be reasonable. However, because the ALJ disregarded Western Union's cost support data and other justification, the ID does not adequately analyze this question. Accordingly, we shall conduct our own analysis of service element earnings in conjunction with the questions raised concerning the reasonableness of overall Telex/TWX earnings. *See*, paras. 70–77, *infra*.

29. The *ID* criticized Western Union's rate presentation because its ratemaking approach included market considerations and found that testimony presented on behalf of Western Union that its rates were "market oriented" was an "admission" that the carrier had ignored costs in designing Telex/TWX rates.[14] *See*, *ID*, n. 19. These criticisms are also ill-founded. Because the ID contains no discussion of this issue, we can only guess that the ALJ perceived costs to be the only factor to be considered in rate design and that the inclusion of market considerations so tainted Western Union's cost presentation that it was unworthy of analysis. However, rates designed with the marketplace in mind and cost-based rates are not necessarily mutually exclusive. A market forecast, for example, which is integral in many cases to determining costs of service, inherently reflects competitive and other market considerations. In addition, a carrier's decisions on the method and degree of rate averaging it will employ is often based in whole or in part on prevailing market conditions. Marketing considerations, therefore, may be an integral part of the ratemaking process and their inclusion, in and of themselves, does not support a finding that the resulting rates for individual service elements are not cost based. Conceivably, more than one rate plan could be chosen, each reasonably based on costs.

30. Nor do we agree with the ID's rejection of Western Union's Telex/TWX rates as unlawful because they were "aligned" with each other and with AT&T's MTS rates. As support for this conclusion, the ID refers to the Commission's decision in *American Telephone and Telegraph Co.*, 59 FCC 2d 671, 703 (1976), *reconsideration granted in part*, 64 FCC 2d 538 (1977), which rejected proposed rates for AT&T's Wide Area Telecommunications Service (WATS). The WATS Decision concerned a very specific fact situation. There, AT&T had presented no independent cost data to justify its WATS rate proposal. Rather, it had supported WATS rates solely on the basis of maintaining rate levels consistent with its MTS rate levels.

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[14] First, it appears that the ALJ took that testimony out of context. That statement was made by Mr. Linde, Western Union's marketing witness, concerning the carrier's ratemaking approach for its non-regulated services, not Telex and TWX (Tr. 4009; Western Union Exceptions, p. 117). Even assuming for the purpose of argument that Mr. Linde had been discussing Telex and TWX rates, it is not clear what the ALJ took that statement to mean.

59 FCC 2d at 703. In the ID, the ALJ states that in the instant case, Western Union ignored costs and "deliberately employed a ratemaking theory (the alignment theory) the Commission has rejected." In essence, it appears that the ALJ assumed that the alleged alignment of Telex and TWX rates was similar in nature to that found unlawful in the WATS Decision and, under the doctrine of *res judicta*, was also clearly unlawful. Thus, the ALJ felt no need to conduct an independent examination of Western Union's rate filing.

31. We find this determination incorrect. Our review of the record on this question revealed that Western Union has independently shown the cost of providing Telex and TWX services. It has also demonstrated the similarity of the two services, their increasing use of common plant, the ability of customers to achieve interservice communication and the competitive nature of the domestic record marketplace, as support for rate structure and rate level consistency. Although Western Union considered AT&T's Dataphone service (provided via the public switched telephone network) in designing its Telex and TWX rates, that fact does not mean that those rates were unrelated to costs. Again, in positioning its service offerings in a competitive market, a carrier must consider competing services and make different rate averaging decisions accordingly. In short, we find the WATS Decision inapposite and shall reverse the ID's alignment determination.

32. In any event, our review of the record shows that, contrary to the ID's finding against Western Union's cost presentation, the carrier did submit studies developing the cost of providing Telex and TWX services (*see*, paras. 36–44, *infra*). It also addressed the relationship between length of haul and the cost of service (*see*, paras. 81–84, *infra*) and thus the ID's criticism on these points is not well-taken.

33. The ALJ perceived the preceeding questions to have been fatal to Western Union's direct case and felt no need to deal with the carrier's cost data in a substantive way. His cursory treatment of the cost material and his erroneous interpretation of Docket No. 18128 leave us with little, if any, analysis to review. Because we disagree with the assumptions underlying the ID's findings in this regard, and find the ID's general criticism of Western Union's rate filing and cost submissions to be unsupported by the record, we shall set aside those findings and substitute our own analysis of Western Union's cost support. We shall commence our analysis with a brief discussion of the Commission's designation of this issue, moving thereafter to an examination of the various studies, their methodological foundations and their relative usefulness in resolving this investigation.

34. The matter of Western Union's cost allocation practices was raised by the Commission in the *Public Telex/TWX Order*, where we stated that:

> [W]e will also determine the reasonableness of Western Union's directly

> attributable cost allocations as well as its allocation of common and joint costs among its various services, relying primarily on cost and revenue data developed under existing methodologies. We are particularly concerned about the consistency of Western Union's application of the FDC [Fully Distributed Cost] Cost methodologies it presently employs.

67 FCC 2d at 1425.

35. Although, the Commission had not prescribed a particular cost allocation methodology or manual to be employed by Western Union, it ordered Western Union to file additional cost information including FDC Method 1 (a combination of direct assignment and relative use allocation) and Method 7 (a specific means of assigning and allocating costs according to historical cost causation) data. As explained, because the Commission in Docket No. 18128 had recently completed a detailed inquiry into the costing practices of AT&T, resulting in a prescription requiring the use of FDC Method 7 by that carrier, the Commission felt that costing method to be a useful guide in examining Western Union's cost and rates in this investigation. *Id.* at 1425. The Commission's general intent was to obtain a more extensive breakdown of Western Union's cost and revenue data than that afforded by the carrier's tariff filing support material submitted pursuant to Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* As an example of the kind of information it sought, the Commission stated that Western Union must provide a further allocation of costs and revenues with respect to the "all other services" category (*see*, para. 8, *supra*) so that it might determine the specific earnings of the services included there and the resultant cross-subsidization, if any. *Id.*

36. In response to the *Public Telex/TWX Order*, Western Union filed three cost studies in the course of the proceeding, two FDC Method 1 studies and another study based on FDC Method 7. The "original" Method 1 study (Western Union Exs. 4 and 15) used the carrier's 1977 Return on Investment (ROI) report (*see*, Western Union Ex. 8, Att. I, pp. 1–3) for its base data. The ROI report showed how total investment, revenues and expenses were apportioned among Western Union's eight major categories of communication services (PMS, Mailgram, Private Wire, Hotline, Broadband, Telex, TWX and Satellite) and the percentage return on investment realized by each category. The original Method 1 study started with the actual operating results provided by the ROI report and further disaggregated costs and revenues. For example, the PMS and Mailgram categories were each broken down into "regulated and "non-regulated" components. Private Line Service was divided into "low speed and high speed" sub-categories. While the ROI report grouped "other services" with PMS in a single column, the Method 1 studies displayed these comparatively small amounts in separate "other regulated" and "other non-regulated" categories.

37. Subsequently, in light of changes in its engineering plan, new

labor agreements and changes in volumes and revenues including the effects of the interim prescription order that the IRCs pay rates equal to those applicable to the public,[15] Western Union submitted an "updated" Method 1 study. Admitting this study into evidence, the first ALJ found that "an updated cost study is essential in order to develop a full and complete record in this proceeding." *The Western Union Telegraph Co.*, FCC 79M-1359, released November 15, 1979. The updated study presented 1978 actual results taken from its ROI report for that year and used those results as the basis for projections for 1979–1981 (Western Union *Exs.* 4A and 18). In the reopened hearings, (*see*, para. 18, *supra*), Western Union also submitted the actual results of its Telex and TWX operations for 1980 (Western Union *Ex.* 41).[16]

38. As stated, Western Union's Method 1 studies assigned or allocated the actual balances recorded in the various investment, revenue and expense accounts in accordance with the procedures used to develop its ROI reports. Accounts associated with a single service, as was generally the case during this period, were directly assigned to that service. On the other hand, accounts which related to the provision of more than one service were allocated between those services using relative use allocations, such as channel miles (Account 1520), service utilization studies (Account 1042:00:09) or circuitry utilization. Some accounts were allocated on the basis of other accounts. For example, advertising expenses were allocated in part on the basis of revenues.

39. Western Union also filed a FDC Method 7 study for the December 1976 - December 1977 period, although it did so under protest and with the caveat that "it does not rely on it as justification of the rates at issue in Docket 78–97." The first ALJ admitted this study into the record (Tr. 3120–3121). *See*, Presiding Judge's *Ex.* 1, p. 1. The FDC Method 7 study was based on the assignment and allocation of all plant investment among its service categories as of December 31, 1976, in accordance with the procedures used to develop Western Union ROI reports. To distribute the average net change in plant investment for the following twelve month period, each portion of the change in investment which could be directly attributed to a particular service on a discrete basis was assigned to that service. On the other hand, the incremental plant investment related to the common support of two or more services was allocated in relation to growth in use of such plant by each service category.

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[15] *See*, para. 15 and n. 10, *supra*.

[16] In response to an ITT Worldcom information request, Western Union also submitted its state separations study for 1979, based on actual results for that year, which separated Telex and TWX net investment, revenues and revenue deductions into interstate and intrastate categories. ITT Worldcom Ex. 42, p. 5. *See*, para. 65 and n. 28, *infra*.

Data sources used to determine the relative growth in use of common plant included the carrier's Plant Extension Record System, Central Telephone Bureau Message Sampling Study and Infomaster Traffic Data. This, Western Union maintained, was in keeping with the Docket No. 18128 requirement that newly completed common plant be assigned on the basis of circuit use (61 FCC 2d at 665). The portion of the average net change in investment for plant and activities for which there was no practical method of establishing a direct causal relationship with services was allocated to each service based on the relative distribution of the total investment in the "directly attributed" and "common plant" elements. Results in 1977 were computed by adding the incremental assignment of plant investment and expenses incurred during 1977 to the year 1976 ROI results.

40. As explained, the ID gave only summary consideration to Western Union's rate presentation after concluding that the carrier's cost data was unverifiable, arbitrary and unauditable. From that premise, the ID went on to make specific findings against the carrier's claimed investment base and expenses and its calculation of federal income taxes (*ID*, paras. 42–47). which resulted in the downward adjustment of Telex/TWX revenue requirements. In our view, however, the ID's analysis of Western Union's costing methods and the resulting cost data was conclusory and insufficient. Thus, we shall first discuss the relative merits of the cost methodologies use by Western Union to decide which cost method provides the most useful data for purposes of review.

41. Since deciding Docket No. 18128, the Commission has departed from FDC Method 7, finding it inadequate and unworkable. In Docket No. 79–245, *American Telephone and Telegraph Co.*. 84 FCC 2d 384, *reconsideration* denied, 86 FCC 2d 667 (1981), *affirmed sub nom. MCI Telecommunications Corp.*, 675 F.2d 408 (D.C. Cir. 1982), the Commission established interim procedures for the apportionment of AT&T's costs among its MTS, WATS, Private Line and Exchange Network Facilities for Interstate Access (ENFIA) service categories. The Commission explained that although FDC Method 7 had been approved in theory in Docket No. 18128, the development of specific procedures was left to working sessions between the affected carriers and Commisson Staff. 84 FCC 2d at 389. However, because those sessions failed to produce acceptable procedures and in light of changes in the direction of telecommuncations regulation, the Commission concluded that no FDC Method 7 system is practicable. *Id.*

42. Accordingly, the Commission prescribed an interim cost allocation manual (ICAM) for AT&T which utilized the existing jurisdictional separations process to determine the revenue requirement for interstate services and required the allocation of investments, expenses and revenues to four aggregated reporting categories (MTS, WATS, Private Line and ENFIA). *See*, 675 F.2d at 412–13.

Because of the complexity and level of detail that would be required, and the absence of a workable method, the Commission specifically declined to prescribe a method to allocate costs to individual services or service elements. 84 FCC 2d at 397.

43. In light of our recent experience with FDC Method 7, there is no need to analyze in detail Western Union's Method 7 study. In addition, since we no longer believe that it is a useful cost allocation methodology, we think that Western Union should not be penalized for any deficiency in its Method 7 study.

44. However, we cannot similarly disregard Western Union's FDC Method 1 studies. The ID's cursory treatment of Western Union's cost data provides no basis for discarding the carrier's Method 1 studies. In fact, the ID's critique in this regard is so general, vague and conclusory as to be of little value for purposes of review. We do know, however, that Western Union's 1978 ROI-based study was admitted as "essential" to the record by the first ALJ and, in conjunction with its 1980 operating results, represents the most recent evidence of costs and revenues drawn form· actual operating experience. In addition, these data provide a more extensive breakdown of costs and revenues among service offerings than the carrier's original 61.38 materials. These data were prepared under methods substantially in line with current Commission costing policy, *i.e.*, the costs are either directly assigned or allocated on the basis of relative use, which is substantially consistent with the ICAM. We find these data more reliable than those prepared by the IRCs and adopted by the ID which manipulates Western Union's original data, as explained below. We find that the updated Method 1 data can be relied upon for analysis of the remaining issues.

B. Telex/TWX Rate Base and Expenses

1. DES Network Investment and Expenses

45. The ID adopted several adjustments of Western Union's Telex/TWX rate base and expenses for the years 1978–1981. Most significantly, the ID found that Western Union had "grossly overstated" the amount of its DES network related investment and expenses allocable to Telex and TWX service.[17] As such, "the Telex/TWX rate base was greatly inflated." *ID*, para. 43.[18] Although

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[17] The DES network consists of four major computerized switching centers connected via satellite transmission circuits. In addition concentrators attached to previously existing electromechanical switches are connected directly to the DES switches through multiplexors called Concentrator Interface Modules (CIMs). The CIMs assertedly permit efficient ulitization of transmission spectrum by combining existing Telex traffic with TWX and new Telex traffic on a single frequency band (Western Union Ex. 13).

[18] In this instance and at other times in the ID, the ALJ used the term "rate base". Inasmuch as his discussion included expenses, taxes and the return on investment, we conclude that he was referring to the carrier's "revenue requirement."

the ALJ acknowledged that in certain instances Western Union appeared to have assigned too few costs to Telex and TWX, he was unable to "precisely tell from this record whether this balances the overinvestment." *ID*, n. 26. As best we can tell, these conclusions were based upon the IRCs' presentation. The downward adjustments of DES investment and expenses, totalling $245 million and $39 million respectively for the entire review period, were calculated by the IRCs in their Proposed Findings of Fact and Conclusions of Law (IRC PF) and restated in the reopened (prescription) hearings by IRC witness Harry Gildea as the data underlying his rate level and refund proposals (IRC Ex. 5). Without discussion, the ID concluded that the adjustment of DES costs allocable to Telex and TWX proposed by Gildea "seems conservative and has been accepted as a valid judgment." *ID*, n. 26. Accordingly, the ID adopted Gildea's DES adjustments without revision, (*ID*, App. A),[19] as well as his corollary "cost-based" rates and refund calculations (*ID*, Appendix C). Thus the assumptions and calculations underlying Gildea's submission must be analyzed to determine whether the ID's adjustments to Western Union's DES investment should be accepted.

46. The IRCs' finding that Western Union's forecast of DES investment for 1978 was overstated by $40 million was based on a comparison between Western Union's original (1977) *forecast* of total (Telex and TWX combined) DES investment for 1978 (approximately $100 million) and the *actual* investment shown in its 1978 ROI report (approximately $60 million). To the IRCs, the resulting $40 million difference represented a 66 percent overstatement ($40 million divided by $60 million) of actual DES investment for 1978 (IRC PF, p. 112; IRC PF, App. B, Section Ia, p.1). Western Union explained, and the IRCs acknowledged that the commencement of integration or "cut over" of Telex and TWX subscribers to the DES network in 1978 was delayed until mid-year (July). To reflect this delay, Gildea applied one-half of the IRC-computed overstatement percentage to the *original forecast* of 1978 DES investment. IRC PF, App. B, Section III, pp. 2–3. In addition, the IRCs and Gildea assumed that DES investment was overstated by 66 percent in each of the

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[19] In addition to adjusting DES costing, the ALJ (1) removed certain investment and expenses for Public Message Service (PMS) and Mailgram Service (MGM) that he found had been improperly assigned to Telex/TWX (*see*, paras. 54–55, *infra*); (2) subtracted certain Infomaster expenses that were found to be unrelated to Telex/TWX and which Western Union did not contest; (3) removed investment, expenses and revenues related to intrastate Telex and TWX services (*see*, paras. 56–60, *infra*); (4) adjusted the Telex/TWX revenue requirements to reflect "the actual income taxes Western Union owed its parent company instead of the hypothetical tax amount that WU had claimed" (*see*, paras. 52–53, *infra*); (5) eliminated all excess earnings above Western Union's 12.5 percent post-tax objective (*see* paras. 63–69, *infra*); and (6) equalized earnings ratios for the principle rate elements, *i.e.*, usage, access, and terminal equipment (*see*, para. 63 and n. 25, *infra*). *See*, ID, para. 96.

succeeding years during which the phased cut over of subscribers continued. Thus, for the years 1979–1981, the amounts of DES investment forecasted in Western Union's original submission (1977) were reduced by $40 million (IRC PF, App. B, Section Ia, pp. 3–4; Tr. 5837–39). Proportionate adjustments of DES expenses were also made for those years.

47. Gildea stated under cross-examination that his proposed adjustments were based on calculations of which he had little knowledge.[20] Gildea also was unable to justify the use of the overstatement percentage to adjust to DES costs in 1979, 1980 and 1981 and admitted as a "mathematical proposition" that had Western Union's cost support data based on its 1978 ROI report been used to analyze the carrier's 1978–1981 revenue requirements, adjustment of DES costs would have been unnecessary (Tr. 5838–42).[21]

48. To repeat, there was no dispute that Western Union's reported 1978 DES investment fell short of the amount projected in its 1977 ROI-based cost study. This fact was brought to light by Western Union's own 1978 ROI report. Thus, the problem facing the ALJ was how to accurately reflect that investment shortfall and find a reliable basis for judging the reasonableness of the carrier's Phase I rates and earnings. Unfortunately, as far as we are able to discern from the ID, the ALJ simply assumed the validity of the IRC adjustment calculations as well as the resulting rate and refund proposals of Gildea, in light of his earlier condemnation of Western Union's cost evidence discussed above. In short, it seems that the ALJ accepted the IRC and Gildea figures without any analysis of the

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[20] For example, he stated that he was not involved in performing the calculations (Tr. 5827), nor was he certain whether those calculations contained any computational errors (Tr. 5828). In his prepared exhibit, Gildea stated that the total DES adjustment he proposed also included adjustments "to correct for misassignment of DES computer costs and laboratory equipment. The source given for these corrections was the IRCs' Proposed Findings (IRC Ex. 5, p. 6; IRC PF, App. B). Gildea indirectly referred to other DES adjustments which were "previously reported to the Commission," again citing the IRCs' Proposed Findings as their source (IRC Ex. 5, p. 6). Those other adjustments concerned CIM facilities, which the IRCs claim created excess network capacity, and multiplexing and termination devices (MPMs and SIM-200s), which the IRCs alleged were improperly allocated between Telex and TWX. All of these adjustments were adopted by the ID without discussion or individual analysis.

[21] Regarding his proposed "reallocation" of multiplexing and termination devices between Telex and TWX, Gildea admitted that he simply adopted the adjustment and rationale of "the person who developed the figures in the IRC proposed findings" (Tr. 5853). Western Union points out that this "reallocation" resulted in the removal of investment from the Telex rate base without a corresponding increase in the TWX rate base (*see*, Western Union Supplemental Proposed Findings (SPF), para. 17). Western Union also notes that the IRCs did not respond to this observation and that the ID, nevertheless, accepted the adjustment without discussion.

methods used to develop them because he perceived them to be the best evidence available. *ID*, para. 94. We believe that this was in error. In the first place the ALJ simply ignored Western Union's more recent cost presentation based on 1978 operating experience. These data were deemed "essential" to a full record by the first ALJ and in were fact relied on by the IRCs and Gildea themselves as the predicate for their adjustments. Moreover, it is unclear to us why the ID favored the IRCs' and Gildea's complex manipulation of Western Union's earlier cost projections when Western Union's actual data were available. Indeed, Gildea's calculations were premised on Western Union's 1977 ROI-based cost study which the ALJ rejected as "outdated" and unverifiable. *See*, *ID*, para. 46.

49. In any event, we find Gildea's calculation of the overstatement adjustment illogical and less reliable than other evidence in the record. As explained, Gildea and the IRCs determined the 1978 DES "overstatement" by comparing 1978 actual DES investment results as shown in Western Union's 1978 ROI study (Western Union Ex. 18) with the carrier's forecast of 1978 DES investment shown in its 1977-base year cost study (Western Union Ex. 15). This operation would seem to indicate a belief in the validity of the 1978 ROI study on the part of the IRCs. Yet after determining the amount of the "overstatement", the IRCs abandoned the 1978 ROI report and ignored Western Union's revenue requirements projections for 1979, 1980 and 1981 which were based on that report. The result of applying the overstatement percentage differential to Western Union's 1977 ROI-based projections for those years, was a significant lowering of DES investment and expenses for the review period. In our view, this was a selective and unsupported use of record evidence. Adding to our reservations in this regard, the ALJ simply pronounced the IRC/Gildea proposals "conservative" and "appropriate" (*ID*, para. 48, n. 26 and para. 96) and adopted them in their original form without analysis or discussion. For the reasons discussed above and because the ID's findings with respect to DES investment and expenses amount to an unreasoned acceptance of the IRCs' Proposed Findings, we must reject the combined study data in favor of Western Union's 1978 ROI results. Absent some compelling reason, which is nowhere to be found here, it makes little sense to rely on a later study as the basis for adjusting an earlier study, when the later study could have been use intact in the first place.

50. Our review of the record, shows that while Western Union's actual 1978 DES investment fell short of its forecast for that year, the carrier's updated forecasts for 1979, 1980 and 1981 generally show increased estimates for DES costs which appear to make up for the shortfall in 1978.[22] In other words, the delay in cutting over

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[22] For example, Western Union originally forecast access-related DES costs for TWX service (*i.e.*, plant and equipment, departmental expenses and pensions and

customers to the DES network was temporary and the record contains detailed data showing the initial use of the DES network to provide Telex and TWX to subscribers in July 1978, the continued gradual integration of Telex and TWX subscribers to the network on a month-by-month basis and the associated monthly investment and expense figures. *See*, Western Union Ex. 18, vol. 2; TRT Ex. 6; Tr. 1900–1902, 1936. On the basis of this information, we conclude that Western Union's 1978 ROI-based cost data adequately took into account the DES investment short fall in 1978 and provided an acceptable picture of DES costs during the review period.

51. Western Union has also demonstrated that its original 1977 cost study underestimated *total* Telex and TWX costs. For example, actual results for Telex and TWX as a whole in 1978 show net investment of over $509 million, compared with the original forecast of $483 million. (*see*, Western Union Ex. 4A, Attachment A; Western Union Ex. 4B). Similarly, 1979 actual net investment was $604 million (*See*, ITT Worldcom Ex. 39), compared with the forecast of $544 million. The 1980 actual net investment was $640 million (Western Union Ex. 34, p. 7), compared with a forecast of $574 million. Based on these comparisons, Western Union argued that any overstatement of DES investment was more than offset by the understatement of total Telex/TWX investment. We agree with Western Union that it would be arbitrary if we were to accept Gildea's adjustments, which are in part premised on 1978 actual results, and at the same time ignore the understatement of total investment also shown by Western Union's actual operating results. Thus, viewed in the context of the full record, we find that the ALJ's adjustment of DES investment and expenses based on Gildea's presentation was unsupported. Accordingly, those adjustments are set aside.

2. Calculation of Telex/TWX Taxes

52. We now turn to Western Union's method of calculating the federal income tax component of the Telex/TWX revenue requirement. Western Union calculated its taxes on a "stand-alone" basis, *i.e.*, as if each service were a separate corporate entity and reflected "the taxes that would be paid if [that service] . . . was earning its revenue requirement" (Tr. 4792). Since the calculations theoretically assumed that all services would earn a uniform return of 12.5

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benefits) of approximately $7.3 million for 1979, $14.2 million for 1980 and $20 million for 1981. Western Union Ex. 15, WPDESACCTWX-1.

By contrast, estimates for these costs shown in the updated study are approximately $10 million for 1979, $18 million for 1980 and 25 million for 1981. Similar upward adjustments were made to estimates for access-related DES costs for Telex (*compare*, Western Union Ex. 15, WPTLXUSG -2 and Western Union Ex. 18, WPDESTLXUSG-2V; Western Union Ex. 15, WPTWXDESUSG-2 and Western Union Ex. 18, WPTWXUSG-2U).

percent after taxes, the amount of taxes allocated to Telex and TWX as a percentage of total tax expenses claimed for all of Western Union's services would be substantially in proportion to the ratio of Telex and TWX investment to total investment. The method of tax calculation proposed by Gildea was based on a different premise. In effect, it offsets the losses from some Western Union services against the profits of others. In this way, the average tax rate paid by Western Union for *all* services is used as the measure of taxes to be recovered from Telex and TWX services individually. This method has the effect of lowering the tax component of the Telex and TWX revenue requirement because the actual overall company return on investment was less than 12.5 percent. In other words, under Gildea's calculations, Telex and TWX ratepayers would benefit from the reduced tax expense resulting from the aggregation of Telex and TWX with lower earning services for purposes of calculating tax expense. Noting only that in 1977 and 1978, Western Union's parent company, Western Union Corporation, paid no income tax, but without discussing either means of calculating tax expense, the ALJ rejected Western Union's "stand-alone" method in favor of that proposed by Gildea. *ID*, para. 45 and App. A.

53. Again, the ID does not provide a rationale for substituting Gildea's method for that used by Western Union. Nevertheless, we note that Gildea's methodology is contrary to the way tax expenses are recouped in the revenue requirement. Normally, a carrier is allowed to compute its estimated federal income tax expenses on an individual service basis, even though such taxes are paid on its company-wide net income. This estimate is usually based on the effective statutory tax rate applicable to the carrier. The Commission has never required that carriers offset the income or losses of one service classification against others in calculating its service by service revenue requirements as proposed by Gildea. Accordingly, we vacate the ALJ's tax related adjustments of the Telex/TWX revenue requirements, and find that the method used by Western Union to calculate taxes to be reasonable.

3. Other Revenue Requirement Adjustments

54. Additional adjustments to Western Union's revenue requirement were proposed by Gildea: (1) investment and expenses related to Western Union's PMS and MGM services were removed from the Telex/TWX revenue requirement; (2) investment, revenues and expenses related to *intrastate* Telex and TWX were excluded; and (3) all earnings on Telex and TWX above 12.5 percent were found excessive and subject to refund. Here, again, the ID provided no meaningful discussion or analysis of these adjustments. They were simply adopted by the ID as "*conservative* and *appropriate* adjustments to the Telex/TWX rate base for the relevant period." *ID*, para. 96.

55. Though it conceded that some PMS and MGM costs were misallocated in its original cost study, Western Union also pointed out that this misallocation was corrected in the updated study (Western Union Ex. 18). *See*, Western Union Ex. p. 34, p. 20. Thus, as in the case of DES costs, the ALJ should have used the forecasts based on more recent operating results rather than relying on the many complex adjustments to the old studies. Accordingly, the PMS and MGM adjustments shall be set aside.

56. Another controversial adjustment of Western Union's revenue requirement adopted by the ID reflected the elimination of *intrastate* Telex/TWX investment and expenses (*see*, *ID*, App. A, pp. 1–8, lines 5 and 16).[23] Again, the ID provides no analysis of this adjustment, however it appears that the ALJ felt it necessary to exclude any investment and expenses relating to intrastate Telex and TWX because of jurisdictional constraints. That is, since the Commission is empowered to regulate only interstate and foreign communications, the ALJ believed he could not accept cost data which presented combined interstate and intrastate results.

57. In the past, we have not required Western Union to segregate its jurisdictional results for cablegram services, *The Western Union Telegraph Co.*, 25 FCC 535 (1958), or Telex services, *The Western Union Telegraph Co.*, (Docket No. 18598), 27 FCC 2d 515, 523–24 (1971); *The Western Union Telegraph Co.*, (Docket No. 19696), 49 FCC 2d 532 (1974). *See also*, *The Western Union Telegraph Co.*, Mimeo No. 000522, released April 30, 1981, para. 20, 46 Fed. Reg. at 26,172 (1981), where the Common Carrier Bureau stated that ". . . Western Union has shown that under the proposed rate structure the cost per call would be the same for both intrastate and interstate service and, conversely Graphnet has not substantiated its claim that the inclusion of intrastate costs would have a negative impact on interstate rates."

58. Our concern, on the other hand, is whether the inclusion of intrastate results obscured Western Union's interstate operating

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[23] These pages indirectly show the amounts of intrastate investment and expenses which, according to Gildea and the IRCs, should have been disallowed for each year of the review period. After calculating Western Union's "Adjusted Total" investment (Western Union's Claimed Net Investment Base" minus adjustments for DES and PMS/Mailgram, lines 1–4), the next item shown is the "Adjusted Interstate Net Investment Base" (line 5). By subtracting line 5 from line 4, the amount of the intrastate disallowance can be determined. For example, for Telex service in 1978, the "Adjusted Total" investment base shown is $314,825,000. The "Adjusted Interstate Net Investment Base" shown is $279,407,000. The difference or intrastate disallowance is $35,418,000. Lines 11 through 16 show similar calculations for intrastate expenses. The calculation of these adjustments was based on 1977–1979 interstate-intrastate separations information submitted by Western Union pursuant to IRC data requests (ITT Ex. 42). *See*, paras. 89–90, *infra*. Gildea used this information to derive so-called "interstate separations factors' for 1977–1979. Because no information was available for 1980 and 1981, Gildea applied to those years the same factor derived for 1979.

results by distorting the cost-revenue relationships for the interstate services. The record shows that the Telex/TWX network was designed primarily to provide interstate services and that Western Union's intrastate operations were incidental to its interstate services, constituting only five to ten percent of total operations (Western Union Ex. 34, p. 9; Tr. 6373–74). Also, intrastate Telex/TWX service was provided over the network at the same rates as interstate Telex/TWX service (Tr. 6392; Western Union Ex. 12, p. 6 *et seq*; Western Union Ex. 34, p. 11).[24] This high degree of identity between intrastate and interstate operations suggests that Western Union's revenue requirement data was not distorted by the aggregation of jurisdictional results.

59. Moreover, the method used by Gildea and adopted by the ALJ to exclude the intrastate costs is open to question. Western Union argues that Gildea's method is arbitrary and excludes too much. Western Union Ex. 34, pp. 9–13. The ID fails to address this argument or why it found Gildea's adjustments more accurate. For our part, we note that while the adjustment eliminates intrastate investment and expenses in each year of the review period, there is no corresponding elimination of revenues associated with intrastate Telex and TWX services. Gildea's "cost-based" rates and resulting refund proposal were produced by comparing his adjusted interstate revenue requirement, which *eliminated* intrastate investment and expenses, with actual Telex and TWX revenues which *included* revenues for intrastate Telex and TWX operations. *See*, *ID*, Apps. A and B. This methodological inconsistency ultimately results in a larger refund figure. In other words, Western Union is penalized for investment and expenses but is not given credit for reduced revenues.

60. Thus, because we have found aggregate results from Western Union acceptable in the past and in light of the close identity of its interstate and intrastate operations and rates, and the ID's failure to explain why it adopted an adjustment which seems both unnecessary and inconsistently carried out, we cannot accept the ID's determination in this regard. Accordingly, we overrule the ID's conclusion that Telex and TWX revenue requirements were overstated because intrastate service costs were not excluded.

C. Telex/TWX Earnings and Interservice Cross-subsidization

61. The level of Western Union's Telex/TWX earnings and the alleged use of these earnings to support other service offerings has been a central issue in this proceeding. In the *Public Telex/TWX Order*, the Commission noted that in 1971 in Docket No. 18598,

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[24] We note that Congress has recognized the incidental nature of intrastate record communications service by preempting state jurisdiction over such service in the RCCA. *See*, 47 U.S.C. § (a)(2) and (d). For a brief discussion of these provisions see FTC Communications, Inc., Mimeo No. 2834, released March 18, 1982, para. 14.

supra, it had prescribed a pre-tax rate of return of 18.92 percent for Telex and Telex-related services. The Commission also observed that in 1974, in Docket No. 19696, *supra*, it had concluded that the previously prescribed 18.92 percent rate of return was still reasonable. *See*, para. 8, *supra*. The Commission was concerned, however, that under the rates filed on December 1, 1977, Western Union had projected pre-tax earnings for Telex and TWX which by 1981 would exceed 18.92 percent and which, in turn, might be used to subsidize services other than PMS. *See*, para. 8, *supra*. For these reasons the Commission "include(d) as part of the investigation a review of our current prescription of a rate of return on Western Union's teleprinter services (Telex and TWX) with a view toward amending that prescription if warranted." *See*, 67 FCC 2d at 1423–25.

62. All three parties presented rate of return prescription evidence. Western Union initially submitted evidence, based on its 1977 capital structure, in support of a post-tax rate of return of 12.5 percent as the minimum fair rate of return for the company overall for the 1978–1981 review period (Western Union Ex. 1). Though Western Union did not present a specific rate of return recommendation for Telex and TWX services, it stated that a 12.5 percent post-tax rate of return was significantly below the minimum return appropriate for these services and that as long as Telex and TWX rates did not result in an overall rate of return in excess of 12.5 percent, those rates should be approved (Western Union Ex. 1, p. 30). After the record had been reopened to take additional evidence on the prescription issue, the Trial Staff recommended an overall rate of return of 13.8 percent for Western Union for 1981 (Trial Staff SPF, p. 25). In rebuttal to the Trial Staff's presentation, Western Union revised its recommendation. While it would accept a 12.5 percent rate of return for 1978–1979, it maintained that based on its 1980 capital structure, it was entitled to a rate of return of 13.9 percent in 1980 and 15.9 percent in 1981 (Western Union Ex. 21). The ID did not consider either proposal. The Trial Staff's recommendation was disregarded because it did not address the first three years of the review period. *ID*, n. 49. No independent reason was given, however, for rejecting Western Union's updated prescription proposal. The ID simply stated that "Western Union's earlier direct presentation . . . has been adopted; *i.e.*, Western Union's contention that under the 1977 capital structure it was entitled to a 12.5% fair rate of return has been credited." The ALJ emphasized that this determination was not a prescription, but would simply be used to measure the reasonableness of the rates *Id*.

63. Having decided on a rate of return benchmark, the ID went on to adopt the IRCs' (Gildea's) rate of return prescription presentation which "eliminated all excess (Telex and TWX) earnings above Western Union's 12.5% post-tax objective," *i.e.*, Telex and TWX earnings above that level would be subject to refund. *ID*, para 96.

The ID also "equalized pre-tax earnings ratios for the principal rate (or service) elements" of Telex and TWX. *ID*, para. 96. That "equalization", in actuality, produced service element returns which, after taxes, would equal 12.5 percent. However, Gildea needed pre-tax earnings figures in order to compute his adjusted Telex and TWX revenue requirements, since the revenue requirement equals the sum of operating expenses, return on investment and tax expenses.[25] In essence, the ID made no separate analyses of what would be a fair and reasonable rate of return for Western Union's *total interstate operations*, its individual Telex and TWX *services*, or the individual Telex and TWX *service elements*; the 12.5 percent post-tax rate of return was decreed reasonable across-the-board and for the entire review period. In addition, the lower "cost-based rates" which Gildea calculated for the 1978–1981 period, were designed to give Western Union a 12.5 percent after tax return on its "adjusted" Telex and TWX rate base. Finding that Gildea's rates "meet Docket No. 18128 guidelines", the ID adopted those rates and the resulting refund calculations. *ID*, Conclusions of Law, paras. 4 and 5.[26]

64. While the Commission did ask the ALJ to consider whether the 18.92 percent pre-tax rate of return prescription for Telex and TWX services should be amended, the ID went far beyond that. As explained above, the ID not only found that a 12.5 percent post-tax rate of return was a reasonable earnings ceiling for Telex and TWX services from 1978 to 1981, but also for the carrier's total interstate operations as well. Clearly, the reasonable rate of return for Western Union overall is an issue beyond the scope of this investigation.

65. The ALJ found that Western Union's Telex and TWX rates of return were excessive, *i.e.*, even greater than the 18.92 percent, and that these excessive earnings were used to cross-subsidize other services. *ID*, paras. 60 and 73. However, it appears that in rendering that decision, the ID relied solely on returns for the *usage element* of Telex and TWX services, and not on earnings for the services as a

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[25] For example, for Telex service in 1978, Gildea multiplied the total "adjusted" Telex investment base, approximately $279 million, times 12.5 percent thereby yielding a return of approximately $35 million. To that figure he added $4 million in federal income taxes based on his allocation of the company's total theoretical income tax liability among all services offerings on the basis of each service's contribution to total investment. The resulting $39 million was then divided by the total adjusted investment base yielding a "pre-tax return factor" of 13.96 percent. Gildea then multiplied the adjusted investment bases of each rate element by that factor, thereby equalizing the pre-tax rates of return. *See*, ID, App. A, p. 1. According to Gildea, his purpose was to correct the Telex and TWX rate structures.

[26] Refunds were in turn calculated based on the difference between the Phase I rates and Gildea's cost-based rates. Although, the ID does not characterize these determinations as a prescription, stating that "(i)f such a prescription becomes necessary it can be done in Phase 2" of this investigation (*ID*, n. 49), the adoption of Gildea's "cost-based rates" and calculation of refunds on the basis of a 12.5 percent rate of return, in effect, constitutes a prescription.

whole. The rates of return cited by the ALJ as the foundation for these findings were derived from Gildea's prepared exhibit (IRC Ex. 5, Att. HG-B-1, pp. 1–6) which purported to show the separate returns on investment for intrastate, interstate and international Telex and TWX *usage* for the years 1977–1979.[27] In fact, there is nothing in the record showing returns of Telex and TWX services above the 18.92 percent prescription.[28] The only rate of return figures for Telex and TWX *services* provided by the ID show pre-tax returns below 18.92 percent. *See*, *ID*, para. 66; para. 67, *infra*. As part of its updated submission, 1980, Western Union's reported pre-tax returns were 16.8 percent for Telex and 11.6 percent for TWX for 1980. Western Union Ex. 41, WP-TAX-13, 14. Accordingly we cannot accept the ID's rate of return finding. Instead, we conclude that Western Union's 1978–1981 overall Telex and TWX rates of return were not unreasonably high.

66. We turn now to the ID's finding that "Telex and TWX cross subsidize practically every other service Western Union offers." *ID*, para. 67. It appears that the ID reached this conclusion by comparing Western Union's pre-tax ROI results for its various services for 1977 and 1978, as shown in the following chart (reproduced as part of paragraph 66 of the ID:)

	Private wire services	Non-communication services	Hotline	Broadband	Telex	TWX	Mail-gram	Public message & other services	All services
ROI for 12 months ENDING 12/31/77	1.4%	(22.3%)	4.7%	(21.4%)	17.8%	18.3%	(2.2%)	0.9%	7.5%
ROI for 12 months ENDING 12/31/78	(1.4%)	94.1%*	4.8%	(19.5%)	17.2%	15.8%	5.4%	1.1%	6.9%

*The wide disparity in the non-communication services rate of return between 1977 and 1978 resulted from a substantial credit adjustment for depreciation expense for non-communication plan in December 1978.

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[27] In addition, it appears that Gildea took these usage figures from the contested "Kelsey studies" submitted by Western Union in response to IRC information requests during the reopened hearings and admitted into the record as ITT Worldcom Exs. 42 and 45. See, n. 16, *supra*. See also paragraphs 89 and 90, *infra*, for a discussion of these studies.

[28] Even ITT Worldcom Ex. 42 contained figures showing 1978 pre-tax returns of 17.0 percent and 15.4 percent, respectively, for TWX and Telex *services*, and 1979 pre-tax returns of 15.6 percent and 10.8 percent, respectively, for Telex and TWX *services* (ITT Ex. 42, pp. 4–5). In fact, Western Union's returns did not exceed the ID's rate of return finding since a 12.5 percent *post-tax* rate of return is approximately 18.75 percent *pre-tax* assuming an effective tax rate for Western Union of 33 percent.

As shown, the rates of return for Telex and TWX exceeded those of other services. To the ALJ, this fact alone was sufficient evidence that Western Union had engaged in improper interservice cross-subsidization. The ALJ was particularly concerned that "(n)ot one other service offering, regulated or non-regulated, earns a rate of return as high as the overall return for all services *except* TWX and Telex.- (Emphasis in original.) *ID*, para. 67. He rejected Western Union's argument that so long as its Telex/TWX rates were "not higher than competition will allow" and did not result in an excessive overall rate of return for the company its rates should not be found unreasonably high. *ID*. para. 69. In his view, the carrier was quarreling with the Commission regarding the seriousness of interservice cross-subsidization and assuming that, after ten years of plant modernization, the Commission should continue to allow Telex/TWX rate payers to "carry the albatross PMS." *ID*, paras. 70–71. He also stated that Western Union's own figures, *i.e.*, those shown at ID paragraph 60, were reason enough for Commission concern that Telex/TWX ratepayers were supporting other services in addition to PMS. *ID*, para. 72.

67. However, the ALJ's finding of unreasonable interservice cross-subsidization also cannot stand, since Western Union's Telex and TWX overall returns did not exceed 18.92 percent. If Telex and TWX returns were not excessive, the fact that the returns on these services were higher than on the other Western Union services does not support a finding of improper cross-subsidization. It means only that certain of the other services may have been deficient earners.

68. Finally, we have determined to vacate the current 18.92 percent pre-tax rate of return prescription for Telex/TWX services. We find that a running Telex/TWX rate of return prescription is no longer warranted. New carrier entry, interconnection requirements and elimination of resale restrictions have changed the telecommunications industry to the point where a traditional regulatory tool such as the rate of return prescription is no longer necessary for Western Union. In our *Fourth Report and Order* in Docket No. 79-252 (Competitive Carrier Rulemaking), FCC-*83–481*, adopted October 19, 1983, we have concluded that there are many reasonable demand substitutes for Western Union's Telex/TWX services. Among these competitive substitutes are (1) domestic teletypewriter exchange services of other carriers, such as the IRCs, including the IRCs' services interconnected with Western Union's Telex/TWX network; (2) facsimilie, sophisticated terminals, communicating word processors and other forms of record telecommunications; (3) private line voice and data services; and (4) switched voice services offered by AT&T and other carriers. These services effectively constrain Western Union's pricing behavior. Because Telex/TWX overlaps in price, delivery time and quality with other services for messages of

varying length, there is a high degree of customer migration between Telex/TWX and alternatives offered by other carriers. Accordingly, in the *Fourth Report and Order*, we have determined that Western Union lacks substantial market power and it has been classified a non-dominant carrier. In this light, we need not tie Western Union to a rate of return prescription. In the future, we shall judge the reasonableness of Western Union's Telex/TWX rates and rates of return on a case-by-case basis.

69. As mentioned above, the ID also found that the earnings ratios for the individual Telex/TWX service elements were unreasonable. Although this determination is set out in a conclusory manner, the ALJ apparently agreed with the IRCs that the earnings for the individual service elements were inordinately unbalanced. *See, ID*, paras. 35–38, 56–57, 96. For instance, IRC witness Harry Gildea argued that a comparison of earnings for the three elements demonstrated the large volume customers were forced to pay excessively high volume sensitive usage rates to subsidize the volume insensitive access and station equipment service elements provided to lower volume customers. To correct this alleged unreasonable discrimination, Gildea proposed that the earnings on each element be equalized to yield earnings of 12.5 percent after taxes. IRC Ex. 5, p. 11. *See*, *ID*, para. 96 and App. A. The ALJ agreed, stating " . . . if we are to remain faithful to Docket 18128's cost precepts, there is every reason to accept Gildea's earnings equalization adjustments." *ID*, para 113.

70. At an earlier point in the ID (para. 57), actual pre-tax service elements earnings ratios were set out for 1977 along with forecasted earnings ratios for these elements for 1978.[29] These figures were taken from Western Union's original cost submission which, as explained above, was superseded by later cost data based upon operating experience. The most recent service element earnings data, contained in Western Union Ex. 41, showed the following post-tax earnings ratios:

	TELEX			
	Total	*Usage*	*Access*	*Stations*
1978	12.5	14.0	1.8	14.5
1979	10.5	13.3	neg.	10.2
1980	11.8	15.4	7.0	11.3
1981 (forecast)	13.2	17.0	neg.	12.8

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[29] These ratios were as follows:

	1977 (Actual)		*1978 (Forecast)*	
	Telex	*TWX*	*Telex*	*TWX*
Terminals (Stations)	19.2%	5.8%	15.8%	4.8%
Access	7.2%	-234.8%	-1.2%	-231.0%
Usage	18.5%	82.3%	15.33%	34.42%

TWX

	Total	*Usage*	*Access*	*Stations*
1978	12.9	28.6	neg.	10.1
1979	6.6	13.6	neg.	5.6
1980	9.1	17.3	0.3	3.8
1981 (forecast)	11.7	20.1	neg.	7.9

71. We have emphasized that, Western Union was not required to design its Telex and TWX service element rates so that each element would yield a return equal to that deemed reasonable for those services overall. Of course, the rates of return for each service element must be reasonable. Analyzing Western Union's earnings figures, we have determined that the average post-tax return on the usage elements for Telex service usage for the review period was approximately 14.81 percent, which translates to a pre-tax average of approximately 20–21 percent. We believe that Telex usage element earnings which exceed the prescribed earnings level for Telex service overall by only 1 or 2 percentage points do not render the service element rates unreasonable, particularly in view of Western Union's competitive justification discussed below. Furthermore, the highest usage element earnings ratio during the period is the 17.0 percent return *forecasted* for 1981. And in that year Western Union postalized its Telex and TWX rates, effective April 24. We believe, therefore, that the 1981 Telex usage figure is of limited use in assessing the reasonableness of these rates over the review period. If the 1981 results are excluded the average is even lower than 14.81 percent.

72. Performing a similar analysis of the earnings shown above for TWX usage, we are satisfied that they, too, are not unreasonably high. We discount the value of the forecasted 1981 figure for reasons just explained. Of the remaining years, only the return of 28.6 percent for 1978 appears to be excessive. However, Exhibit 41 shows that this return occured during a 12-month period in which net investment for TWX usage-related facilities appeared abnormally low. Western Union's net TWX usage investment in 1978 was only approximately $57 million, as compared to $121 million in 1978 and $96 million in 1980.[30]

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[30] Western Union Exhibit 41 shows the following net investment figures for the Telex and TWX service elements:

Telex Net Investment (in thousands of dollars)

	Total	*Usage*	*Access*	*Stations*
1978	347,710	249,950	45,765	51,995
1979	392,650	285,002	56,990	49,658
1980	424,230	274,659	98,193	51,428
1981	411,083	302,938	61,122	47,023

73. We note also that in 1978, the TWX rates at issue in this phase of Docket No. 78–97 did not become effective until August 10. Therefore, the high 28.6 percent return ratio represented only a small portion of the review period. The figures shown for 1979 and 1980 seem more reresentative of the earnings performance of these rates.[31]

74. Western Union presented substantial competitive justification for the relatively high rates of return on the Telex/TWX usage elements. Western Union defended the differing Telex/TWX service element return levels on grounds that historically its pricing of Telex and TWX services has largely been determined by the rates and rate structures of services offered by its competitors. For instance, when Western Union initiated Telex service in 1958 to compete with TWX service, then provided by AT&T, its "station" charge, which encompassed both station equipment and network access, was $35 per month, while AT&T's comparable TWX charge was only $10 per month. Western Union stated that it was unable to raise its station charge without forfeiting new subscribers (Western Union Ex. 34, p. 15). Western Union further stated that because AT&T's TWX usage charges were distance sensitive, its Telex usage charges also varied by distance. In essence, Western Union states that it was forced by competition to price its Telex usage element higher than the other service elements, while attempting at the same time to maintain a Telex rate structure that was reasonably parallel to AT&T's TWX rate structure. (*See*, paras. 81–84, *infra*).[32]

75. When it acquired TWX, it established separate station and access charges for both Telex and TWX, but continued the existing usage rate schedules. Nevertheless, it maintained that, as in the

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TWX Net Investment (in thousands of dollars)

	Total	*Usage*	*Access*	*Stations*
1978	151,043	57,149	7,206	86,688
1979	213,991	121,129	10,605	82,251
1980	217,227	95,729	38,584	82,914
1981	227,521	139,130	12,520	75,871

[31] The increase in the level of earnings for TWX usage in 1980 (17.3 percent for 1980 compared with 13.6 for 1979) appears to be the result of the allocation of approximately 20 percent less investment to that element in 1980 than in 1979 (approximately $96 million in 1980 compared to approximately $121 million in 1979). *See*, n. 32, *supra*. TWX usage revenues were almost constant in both years ($119,702,000 in 1979 and $121,259,000 in 1980). *See*, Western Union Ex. 41, pp. WPTax-8 and WPTax-14.

[32] Western Union states that since 1971, AT&T has expanded its MTS/WATS "dataphone" teleprinter services, an action which Western Union perceived as a direct competitive substitute for Telex and TWX service, and which had to be taken into account in its Telex and TWX rate design. Similarly, Western Union noted that just prior to the period under review, AT&T began to modify its MTS rate structure by raising its short-haul rates while lowering its long-haul rates. Western Union maintained that its ratemaking followed a similar pattern in an attempt to meet competition and improve the relationship between its Telex and TWX costs and rates. Western Union Ex. 34, p. 17.

past, it was constrained by competitive factors from setting precisely cost-based access charges. Its station equipment charges were set at levels to compete with other suppliers of station equipment, says Western Union. This competition was said to primarily come from the IRCs, which according to Western Union "bundled" their rates in their "gateways", where they competed with Western Union to provide access to the international switch. Western Union maintained that the IRCs, in essence, gave network access and station equipment to their customers free of charge.[33] Western Union maintained that while its access charges did not yield rates of return equal to those for station equipment and usage, they did cover a substantial portion of the revenue requirements attributed to access and were higher than the comparable charges of most, if not all, of its competitors. In short, Western Union stated that its rate element charges were a reasonable response to competitive service offerings and that charges which ignored these factors would have priced Western Union out of the marketplace.

76. As explained above, the ALJ interpreted these competitive arguments as evidence that Western Union ignored costs in designing its Telex/TWX rates. We disagree. Based upon our review of the record, Western Union's perception of significant competition from other carriers was valid. Our policies afford carriers some degree of pricing flexibility to meet competition. In light of these facts, in conjunction with our finding that Telex/TWX usage rates were only slightly above the return level deemed reasonable for Telex/TWX services overall during the period under review, we conclude that Western Union's service element pricing was within the zone of reasonableness. Accordingly, the ID's findings to the contrary shall be set aside.

D. Telex/TWX Rate Structure

77. This section discusses the ID's rate structure finding. Specifically, we address the concern expressed in the designation order that the disparity in usage rates between long-haul and short-haul users could be unjustly discriminatory.

78. Throughout this proceeding, Western Union has argued that Telex and TWX transmission costs were insensitive to distance because of the configuration of its network and its use of satellite circuits. In essence, Western Union maintains that transmission costs vary with the number of switches traversed and not necessarily

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[33] *See*, Customer Use of Telex Service ("Unbundling Order"), 76 FCC 2d 61 (1980), where the Commission conditioned the expansion of IRC "gateway" operations by requiring the IRCs to charge separately for terminal (station) equipment and access service elements. There, the Commission concluded that the IRCs' bundled rate structure had "enabled the IRCs to provide terminals to gateway subscribers for free or at a nominal charge", while Western Union, on the other hand, has been required to charge separately for its terminal equipment and access. 76 FCC 2d at 66–67.

with the distance between originating and terminating stations. In other words, depending upon to which switching site these stations are "homed", a 100 mile call could use the same number of switches as a 10 mile call and may not cost any more. The ID interpreted Western Union's explanation of "distance insensitivity" to mean that the longer the distance of a call, the greater the cost.

> The cost *per mile* to furnish such service didn't decrease as the mileage distance between the service points increased. In other words it cost Western Union the same amount of money to furnish a mile of usage whether it was the 11th mile, the 183rd mile or the 256th mile. So if Western Union had constructed TWX and Telex usage schedules that were properly related to the cost of furnishing usage the subscriber who transmitted a 200-mile message would have paid a usage rate that *was* 20 times as much as the subscriber who transmitted a 10-mile message. But the *cost* per mile to each one of them would have been the same.

ID, para. 50 (emphasis in original). On the basis of this interpretation the ALJ found that Western Union had deliberately constructed a usage rate structure that placed an unfair burden on short-haul traffic since the charge per mile was greater for short-haul users than for long haul users. Accordingly, the ID found Western Union had unjustly discriminated against short-haul users within the meaning of Section 202(a) of the Communications Act.

79. Western Union in its exceptions argues that the ALJ misunderstood its explanation of distance insensitivity and thus failed to properly analyze the relationship between costs and rates. Western Union Exceptions, pp. 108–112. We agree. As we interpret the language in the ID quoted above (para. 79, *supra*) the ALJ understood distance insensitivity to mean exactly the opposite of that intended by Western Union. Moreover, the ID's rate structure analysis ignored record evidence relevant to the short-haul/long-haul issue. Western Union witness Alexander Chisolm presented the following data showing that prior to the Phase I rate filing (when Telex service was provided exclusively on the electromechanical network) Telex/TWX rates were more sensitive to distance than were Telex/TWX costs, and that the Phase I rate filing, which reflected the phase-in of the DES network, greatly improved the relationship between costs and rates:

TELEX
Cost/Minute vs. Rate/Minute
by Rate Zone

	Costs-1977		*Rates-1977*		*Rates-1978*	
Rate Zone	*Cost/ Minute*	*Relationship to Zone A*	*Rate/ Minute*	*Relationship to Zone A*	*Rate/ Minute*	*Relationship to Zone A*
A	$.227	1.0	$.1.75	1.0	$.225	1.0
B-C	$.300	1.3	$.357	2.0	$.450	2.0
D	$.341	1.5	$.60	3.4	$.525	2.3

*Weighted average rate for Zone B (30¢) and Zone C (45¢).

Western Union Ex. 34, pp. 43–44.

80. Chisolm also offered evidence that in 1977, when TWX service was provided via Bell System plant, costs were less sensitive to distance than were rates. As an example he presented evidence to show the *rates per minute* applicable to the average short-haul call of 108 miles and the average long-haul call of 920 miles were more sensitive to distance than the *cost per minute* for such calls:

TWX
1977

	Rate Per Minute	*Ratio*	*Net Invest. Per Minute*	*Ratio*	*Expense Per Minute*	*Ratio*
108 Miles	$.25	1	$.19	1	$.21	1
920 Miles	$.55	2.2	$.26	1.4	$.25	1.2

Id. at p. 45. In 1978, Western Union began its phased implementation of DES. Thus, according to Chisolm, while electromechanical Telex network costs and the pre-DES TWX costs had some degree of distance sensitivity, the phasing-in of DES gradually lessened the carrier's network distance-related cost functions, culminating, in 1981, upon the full cutover to DES, in network costs bearing no reasonable relationship to length of haul. *Id.* at p. 46. These data were not substantially challenged.

81. Chisolm also submitted an analysis showing that, due to the DES network's switching configuration, there is no meaningful correlation between the length of haul or "route miles" (the distance of subscriber locations to and from DES sites) and "airline miles" (the distance between points of origin and termination upon which billing is based) involved in particular calls. According to this analysis, to which no substantive challenge was made, calls of the shortest and longest airline mileage involved approximately equal average route mileage. *Id.*, at pp. 52–56.

82. The record shows that Western Union's pre-Phase I Telex/TWX *rate* structure was in fact far more distance sensitive than its pre-Phase I Telex/TWX *cost* structure. In other words, we are persuaded by this information that the Phase I rate revisions brought the Telex/TWX rate structure into closer correlation with costs. The full implementation of the DES network has virtually eliminated distance as a determinant of cost, a fact to which one IRC, RCA Globcom, attested. *See, Western Union Telegraph Co.*, Mimeo No. 000522, released April 30, 1981, at para. 25, 46 Fed. Reg. at 26,173 (1981). On the basis of DES implementation, Western Union filed its postalized Telex and TWX tariffs in which the applicable rates do not vary length of haul.

83. Taking the unrebutted record evidence on this question, in conjunction with the historical progression of Telex and TWX rates and the development of the DES network, the ID's finding that Western Union's rate structure unreasonably discriminated against

short-haul users is unsupported. The Phase I rate filing was a substantial step toward cost-based rates. The increase of short-haul rates and decrease of long-haul rates does not amount to an unreasonable discrimination under Section 202(a) of the Act. Accordingly, we are satisfied that the Phase I Telex/TWX rate structure did not unlawfully discriminate against short-haul users.

E. The IRC Discount

84. The ID granted the IRCs a 25 percent discount from the publicly tariffed domestic usage rates on the theory that it is cheaper for Western Union to furnish the domestic landline portion of international service than to provide public domestic service. This theory, propounded by the IRCs, was based on asserted physical differences in furnishing domestic and international service. The IRCs argued that in their case Western Union interconnected with IRC non-blocking switches, resulting in shorter set-up times and higher IRC call completion ratio as well as less non-billable time. Because the IRCs were interconnected on a trunk basis in contrast to subscriber line connection for public customers, the IRCs claimed that Western Union's handling of IRC traffic was more efficient. They also contended that because there were larger time zone differences between originating and terminating stations associated with IRC-international traffic, a significantly larger percentage of inbound international calls were transmitted during off-peak hours, which according to the IRCs warranted a special off-peak rate discount. The ALJ "concluded that the IRCs showing on the cost differences between IRC and domestic Telex/TWX traffic is reasonable, and can be relied on for our purposes." *ID*, para. 89. He also summarily rejected the rebuttal evidence of Western Union and the Trial Staff because the IRC presentation was based on costs "ultimately provided by or derived from information Western Union furnished." *Id.* Upon review of the record, however, we conclude that a discount is not warranted.

85. As explained, the Commission designated the cost savings or discount issue with reluctance. *See*, para. 10, *supra*. It stated its belief that any functional differences between the provision of service to the IRCs and public were minor from an overall systems point of view and did not significantly affect the important cost determinants of trunk engineering, switching configuration, or network routing. Thus, it tentatively found that there was "no basis for concluding that a call which transits the domestic switched network for ultimate connection with an overseas terminal has cost functions inherently different from those which are destined to points within the forty-eight contiguous states." 68 FCC 2d at 116. The Commission also found the other alleged cost savings, such as non-capitalized administrative and overhead expenses, were of the sort which are "incurred in roughly the same proportion to usage, or other

determinants such as dedicated facilities in certain circumstances, for all customers, and an individual customer of a service would not normally be heard to claim the right to special rate treatment on the basis that fewer administrative costs are associated with its service than the service provided to other customers." *Id.* at 123.

86. Moreover, the Commission while acknowledging that "rates for Telex and TWX services reflect a high degree of nationwide averaging," stated that it could not find the carrier had "exceeded the bounds of permissable averaging. . . ." *Id.* at 116. However, because the IRCs had received some differential rate treatment in the past and because separate IRC tariffs had been filed, the Commission decided to consider in this investigation "whether any cost differences found to exist are of such a magnitude as to render unreasonable Western Union's practice of averaging these costs over its public and IRC customers." *Id.* Yet "[i]n recognition of the public interest considerations which may favor some degree of cost-averaging," the Commission deemed it "reasonable to have the IRCs first demonstrate a likelihood of substantial cost differences in providing public and IRC service before requiring [Western Union] to submit disaggregated [IRC versus public cost] data." *Id.* at 123, n. 41.

87. The ID questioned the Commission's determination to have the IRCs show initially that a discount was warranted. Indeed, according to the ID, the Commission's decision in this regard was "a mystery" since only Western Union had access to the cost data relevant to this question and "as a matter of both law and common sense, the burden of proceeding should have been placed on. . . Western Union." *Id*, para. 80, n. 45. However, the Commission's reasons for requiring the IRCs to substantiate their claims of significant cost differences, that is, administrative efficiency and the avoidance of unnecessary expenditures by the parties, were clearly stated and within our discretionary power to order Commission proceedings.[34] In any event, in requiring the IRCs to substantiate that the alleged cost differences were so great as to warrant different rates for IRC and public traffic, the Commission did not expect them to provide detailed data on Western Union's costs of service. We agree that only Western Union had such data. What the Commission sought from the IRCs was a more detailed, substantive, common sense explanation of their claims, in particular why the alleged cost differences were significant enough to require Western Union to deaverage its Telex/TWX rates. Instead the IRCs repeated arguments, which we had already considered in our *IRC Telex/TWX Order*, purporting to buttress them with data supplied by Western Union (see paras. 86–87, *infra*). Moreover, as discussed below,

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[34] *See,* Permian Basin Area Rate Cases, 390 U.S. 747, 776–77 (1968); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524–25 (1978).

Western Union and the Trial Staff produced more convincing evidence to the contrary. Thus, to the extent the ID's discount findings were based on Western Union's failure to present an affirmative case on this issue, (see *ID*, paras. 81, 89 and n. 48), those findings are set aside.

88. The IRCs attempted to corroborate their discount claims by referring to two sets of Telex/TWX cost data supplied by Western Union late in the proceeding which, according to the IRCs, illustrate cost differentials between Western Union's international and public services. The first set of documents consist of state separations studies for the years 1977 through 1979 prepared by Western Union for submission to state regulatory commissions in intrastate rate proceedings (ITT Worldcom Ex. 42). These studies allocated investment, revenues and expenses between interstate and intrastate operations. While, according to Western Union, those studies were prepared for the purpose of developing intrastate separations, they also set forth purported revenue and cost allocations to international traffic. It was those latter allocations upon which the IRCs relied and which the ALJ found corroborated their case. The second set of documents were the so-called Kelsey studies (ITT Worldcom Ex. 45) prepared in 1977 by Mr. Fred Kelsey, then a Western Union employee. These studies consist of two alternative analyses (one employing total minutes of use, the other using minutes of use and the number of switches traversed) which purported to separate interstate and intrastate results.

89. The so-called Kelsey studies and the state separations studies indicated that IRC traffic was more profitable than domestic interstate and intrastate traffic. However, Western Union maintained that these studies contained methodological deficiencies and computational errors which rendered them useless for the purpose of estimating the relative cost of domestic and international service. For example, Western Union stated that the state separation studies, based on a 1976 study of Telex minutes of use, did not take into account that since 1976 international traffic has grown faster than domestic traffic which may account for the higher revenues for international traffic. The studies also failed to reflect inbound international traffic, which had different cost characteristics than outbound traffic (Western Union Ex. 43, pp. 2, 5). *See also*, n. 36, *infra*. For TWX, Western Union pointed out that the state separations studies for 1977 and 1978 were based on relative use relationships developed from a three month sample (TOL 950 reports) of 1977 TWX usage. According to Western Union, the studies contained other examples of incompleteness or inconsistency. Not only did the use of that sample data for 1978 fail to reflect the growth and changes in relative use relationships for 1978 as compared with 1977, but the sample data was inconsistent with Western Union's full-year book revenues data (Western Union Ex. 34, p. 33). The 1977

state separations studies use a minute-miles relationship to allocate the transmission (distance sensitive) portion of TWX costs. Chisolm noted, however, that the study incorrectly computed minute-miles by double counting messages, thereby understating the allocation of costs to the international traffic category (Western Union Ex. 34, p. 34). The Trial Staff also raised these same questions regarding the usefulness of these studies (Trial Staff SPF, pp. 29).

90. In their exceptions, both the Trial Staff and Western Union argued against a discount for the IRCs. For example, the Trial Staff cogently points out that the "differences" in providing IRC-interconnected service, *e.g.*, shorter set up times, a higher call completion ratio and larger time zone differences between the originating and terminating stations for international traffic, and IRC interconnection on a trunk basis as opposed to subscriber lines for public customers, are exactly the kinds of differences which the Commission viewed as insignificant when it designated this issue. In addition, the Trial Staff sets forth a number of factors which mitigate the asserted cost differences between providing service to the IRCs and public and which the ALJ chose to ignore.[35]

91. Western Union also protests the ID's lack of substantive discussion of the cost savings issue and maintains that the ALJ ignored the Commission's *IRC Telex/TWX Order*. Specifically, Western Union asserts that the discount finding was based solely on the IRCs' cost savings claims, without analyzing whether the alleged savings were of sufficient magnitude to warrant a departure from the general principle of rate-averaging. Like the Trial Staff, Western Union details counter-balancing factors between public and IRC-interconnected traffic which cut against the ID's discount determination. It states that the savings associated with trunk connection amount to less than 3 percent and that even if there were merit to the IRCs' proposal of an off-peak rate differential, it should be afforded to all customers, not just the IRCs. Western Union also points out that the discount was applied to TWX as well as to Telex,

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[35] For instance, the Trial Staff points out that while there are shorter set-up times and higher call completion ratios for outbound IRC-interconnected traffic, the reverse is true for inbound traffic. Western Union Exs. 22 and 24; IRC Ex. 3A. The Trial Staff observes that had the IRCs included inbound traffic data in their analysis of call completion ratios and set up times, the differentials between public and IRC-interconnected traffic would have been much smaller than those claimed by the IRCs and adopted by the ALJ. The Trial Staff argues further that call completion ratios and set up time data merely reflect varying customer usage patterns. Measurement of any large customer of Telex and TWX would likely show more efficient call completion ratios and set up times than the average customer, says the Trial Staff. The Trial Staff also notes that the IRCs were provided access to the Western Union switches without charge (Tr. 3931), and that Western Union witness Acunis testified that there were over 1100 such free access trunks (Tr. 1525). The Trial Staff calculates that at the $30 monthly charge applicable to the public, the IRCs received free of charge services worth $422,280 annually.

even though the IRCs' witness acknowledged that he had "not looked at TWX" data in arriving at his discount proposal (Tr. 5200).[36]

92. Western Union goes on to observe that, notwithstanding these factors and assuming that we were to find merit in the IRCs' cost saving claims, a discount of the magnitude found by the ID is still not warranted. It argues that the record evidence referred to in the ID adds up to a Telex cost differential of only 16 percent, yet the IRCs maintained that there was a 20 to 23 percent savings. It is thus unclear how the ID arrives at a 25 percent discount, says Western Union. In any event, the carrier states that even these figures are well within the range of cost variances which it encounters in serving its universe of 140,000 subscribers, and that differentials between various domestic calls can vary as much as 37 percent.

93. Within the process of carrier-initiated ratemaking, carriers are given considerable flexibility to average their costs among their subscriber base. Rates for all nationwide services are averaged to some degree, (otherwise a different rate would be set for each customer). In addition, carriers must have the freedom to configure their networks in the most efficient manner possible and, as can be seen in this case in relation to trunk versus subscriber line connections, some physical or structural differences in the provision of service may exist between customers purely as a means to lower overall network costs. This is not grounds, however, for a claim by a particular service user for more favorable rate treatment.

94. The real issue then is whether the degree of rate averaging practiced by Western Union was reasonable. We find that it was. Indeed, the IRCs did not substantiate or go beyond their original arguments for a discount. The record here shows that the cost differences associated with providing service to the IRCs and public were minor, and do not, standing alone, warrant a finding of unreasonableness and mandatory rate deaveraging. Nor, we note, did the ID discuss the magnitude of these alleged costs differences in finding for a discount.

95. Based on the foregoing analysis of the record, we shall vacate the ID's IRC discount determination. The infirmities of the IRC rate differential presentation coupled with the countervailing arguments of the Trial Staff and Western Union support our conclusion that Western Union's rate averaging practices were not unreasonable. In short, we believe our original instincts on this issue were correct. This conclusion, of course, calls into question the continuance of our

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[36] Western Union notes that the IRCs' case for a discount was based on factors relating to Western Union's electromechanical system and ignored not only TWX but also the DES network which took over an increasing share of Telex traffic during the review period.

interim prescription in Docket No. 82–122 of a 15 percent rate discount on record services provided to other record carriers.[37] That determination was in part premised on the ID's finding of significant cost savings associated with IRC-interconnected services, in contrast to public domestic services. Because we have today reversed that finding of the ID, we shall reassess Docket No. 82–122 accordingly.

F. Refunds

96. As mentioned above, the ID adopted the refund plan proposed by IRC witness Gildea. Under this plan so-called "cost-based rates" were derived for each year of the Phase I period through (1) the recalculation of the Telex/TWX costs by disallowing certain assertedly improper investments and expenses; (2) the recalculation of Western Union's tax liability on the basis of the revised costs; (3) the equalization of return ratios for the three service rate elements at 12.5 percent; and (4) the incorporation of the claimed 25 percent discount for IRC interconnected traffic. The result is that the "cost based" rates for the usage elements of Telex and TWX service were in most cases lower than the actual rates under investigation, while the opposite was true for the terminal equipment and network access elements. Refunds were determined by calculating the amount overpaid, *i.e.*, "cost based" rates minus the rates actually paid. This procedure resulted in the ID's finding that as a group the IRCs were entitled to refunds of over $74 million, plus interest. In view of our preceeding discussion setting aside the erroneous determinations upon which the refund order was based, we conclude that a refund in this case is unwarranted.

IV. *Related Concerns*

97. The conclusions we have reached today in Phase I will undoubtedly have an impact on Phase II of this proceeding and the interim discount prescribed in Docket No. 82–122. We shall shortly issue separate orders regarding those matters.

V. *Conclusion*

98. In summary, we have concluded that the Initial Decision in Phase I of Docket No. 78–97 ignored record evidence relevant to the issues designated for investigation and lacked sufficient analytical foundation for the findings reached. On review of the record, we have determined that Western Union adequately demonstrated its costs of providing Telex and TWX services during the review period and that its rates were reasonably related to those costs and did not result in earnings above the 18.92 percent pre-tax rate of return prescribed in 1971 and 1974. However, because we no longer believe

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[37] *Interconnection Arrangements Between and Among Domestic and International Record Carriers (Interim Order)*, 89 FCC 2d 928, 959–60 (1982).

a prescribed Telex/TWX rate of return is necessary, we have vacated that prescription and in the future shall determine the reasonableness of Telex and TWX earnings on a case-by-case basis. We have also found that the Telex/TWX rate structure during this time did not result in unreasonably high charges for short-haul usage of these services and that, in fact, the rates at issue appear to have significantly improved a previous imbalance between Telex/TWX costs and rates. In addition, we have concluded that there were no significant cost savings associated with Western Union's handling of IRC-interconnected Telex/TWX traffic as opposed to public domestic Telex/TWX traffic and, accordingly, that the IRCs were not entitled to a rate discount. Based on the foregoing, we have also set aside the Initial Decision's order that Western Union pay refunds to its customers for the charges paid during the review period. Having resolved these issues, Phase I of this proceeding will be terminated.

VI. *Order*

99. Accordingly, IT IS ORDERED, That The Western Union Telegraph Company's Telex and TWX tariff rates filed under Transmittal Nos. 7346, 7347, 7348 and 7417 have been found reasonable and that the findings of fact and conclusions of law the Administrative Law Judge in the Initial Decision in Phase I of Docket 78–97 to the contrary ARE SET ASIDE AND MODIFIED as indicated above.

100. IT IS FURTHER ORDERED, That the exceptions to the Initial Decision in this proceeding filed by The Western Union Telegraph Company and the Separated Trial Staff ARE GRANTED to the extent indicated above and ARE OTHERWISE DENIED. The exceptions filed by the International Record Carriers ARE DENIED.

101. IT IS FURTHER ORDERED, That the 18.92 percent pre-tax rate of return for the Western Union Telegraph Company's Telex and TWX services prescribed in Docket No. 18598 (1971) and maintained in Docket No. 19696 (1974) IS VACATED.

102. IT IS FURTHER ORDERED, That the request for refunds filed by Graphnet, Inc. IS DENIED.

103. IT IS FURTHER ORDERED, That the request for oral argument filed by The Western Union Telegraph Company IS DENIED.

104. IT IS FURTHER ORDERED That Phase II of Docket No. 78–97 IS DEFERRED pending further Commission Order.

105. IT IS FURTHER ORDERED, That Phase I of Docket No. 78–97 IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAMI J. TRICARICO, *Secretary*

FCC 82D-14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
THE WESTERN UNION TELEGRAPH COMPANY	CC Docket No. 78–97
Revisions to Tariff FCC Nos. 240 and 258 filed with Transmittal No. 7346; Tariff FCC Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; Revisions to Tariff FCC Nos. 229, 240, 254, 255, 258, 260, 263 and 268 filed with Transmittal No. 7417.	

INITIAL DECISION IN PHASE I OF DOCKET NO. 78–97

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Appendix B - Gildea's Adjustment Ratios

Appendix C - The Appropriate Rates for the 1978–1981 Time Period and The Basis for One of the IRCs' Refund Claims

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY Revisions to Tariff FCC Nos. 240 and 258 filed with Transmittal No. 7346; Tariff FCC Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; Revisions to Tariff FCC Nos. 229, 240, 254, 255, 258, 260, 263 and 268 filed with Transmittal No. 7417.	CC Docket N0. 78–97

Appearances

Joel Yohalem, *James L. Winston*, *Peter G. Wolfe*, *Arthur H. Simms*, and *H. Richard Juhnke* on behalf of The Western Union Telegraph Company; *William V. Catucci*, *Harry L. Trantina*, *Terry Mahn*, *Hathway Watson, III*, *Alfred A. Green* and *Michael J. Goldey* on behalf of American Telephone and Telegraph Company; *Roger P. Newell* and *Kathryn E. McDonnell* on behalf of Western Union International Inc.; *Victor J. Toth* on behalf of American Facsimile Systems, Inc.; *Joseph J. Jacobs*, *Peter M. Andersen*, *Richard Heitmann* and *Sandra K. Kincaid* on behalf of ITT World Communications, Inc.; *Roderick A. Mette* and *Lloyd D. Young* on behalf of TRT Telecommunications Corporation; *Walter H. Morse*, *Robert F. Heath* and *Riley K. Temple* on behalf of RCA Global Communications Inc.; *Michael L. Glaser*, *Francis E. Fletcher, Jr.*, *Sally L. Stevens*, *Steven Carroll* and *Roger P. Newell* on behalf of FTC Communications, Inc., and *Susan Magnotti*, *Marilyn Bain*, *Julia Waysdorf*, *Giovanna Longo*, *Robert W. Spangler* and *James O. Juntilla* on behalf of The Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION IN PHASE I OF CC DOCKET NO. 78–97 OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: March 4, 1982; Released: March 10, 1982)

Preliminary Statement

1. In Phase 1 of this Docket we are concerned only with the first

three sets of TWX/Telex rate revisions that The Western Union Telegraph Company (Western Union or WU) has filed.[1]

2. Western Union offers two integrated teleprinter exchange services; i.e., TWX and Telex. Under these two services subscribers can transmit typewritten and data communications from one subscriber station to another. WU offers Telex under its Tariff FCC No. 240 and TWX under its Tariff FCC No. 258. Because of certain technical differences Telex is a more message oriented service while TWX is better suited to low-speed data transmission.

3. Phase 1 was ostensibly born on December 1, 1977.[2] On that day WU filed prospective changes in its domestic Telex and TWX tariffs. It proposed essentially four types of tariff changes: (1) it reduced the number of rate usage zones for Telex and the number of mileage bands for TWX along with comparable Infomaster service changes; (2) it changed the level of the usage rates for both TWX and Telex; i.e., it significantly increased short-haul rates[3] and slightly decreased long-haul rates; (3) it increased remote extension charges; and (4) it increased the charges for additional directory listings.

4. The following day (December 2nd, 1977), Western Union filed two new tariffs - FCC Tariffs Nos. 268 and 269. Those tariffs set out the domestic Telex and TWX rates and regulations that WU furnishes to the IRCs.[4] [5] Under those tariffs WU would charge the IRCs the same rate for the domestic portion of their TWX and Telex services as it charges its purely domestic subscribers between the same pair of points.

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[1] Under the Communications Act of 1934, as amended, a communications common carrier can initiate tariff revisions at will. In other words, even though a carrier has a set of tariff revisions in hearing being tested it can file additional revisions whenever it pleases. So far Western Union has filed four sets of revisions and has indicated that at least two more sets of revisions are on the way (Tr. 5740–5741). The fourth set of tariff revisions; i.e., the postalized rate revisions (MO&O released April 30, 1981) will be considered in the Phase 2 Initial Decision.

[2] The word "ostensibly" has been used because it appears that long before December 1, 1977, Western Union's Telex and TWX rates were in no way related to the cost of providing such services and the Carrier employed Telex and TWX rate structures that unreasonably discriminated against short-haul users and in favor of long-haul users.

[3] This revision is the real heart of the Phase 1 problem. When WU further increased the rates to the short-haul users and further decreased them to the long-haul users it was exacerbating an already discriminatory rate structure. See Footnote 2 *supra*. These revisions were bound to draw the fire of the International Record Carriers (IRCs) who were Western Union's major customers. Overseas Telex usage accounts for 53% of Telex network usage and 35% of TWX network usage (Tr. 3942).

[4] The IRCs are: (1) Western Union International (WUI); (2) ITT World Communications Inc. (ITT); (3) RCA Global Communications Inc. (RCA); (4) TRT Telecommunications Corporation (TRT); and (5) FTC Communications Inc. (FTC).

[5] Up until the December 2nd filing the division of charges for the provision of overseas Telex service were covered by contracts between WU and each individual IRC.

5. Since the December 1st and 2nd filings, in combination, would increase the amount WU would charge the IRCs for the domestic portion of an International Telex message; and since the December 2nd filing replaced the 5 1;2% discount that WU had previously given the IRCs via the interconnection contracts (see Footnote 5 and 71 FCC 2d 621 at Footnotes 5 and 9), the IRCs opposed them.

6. In opposing the IRCs made several contentions. But only two of them are worth noting at this point. First, and most importantly, they pointed out that WU's proposed rate increases would significantly raise short-haul Telex and TWX rates; that generally the distance of the WU landline segment of an International Telex message is short-haul; and that therefore the IRCs would experience unreasonably high rate increases in relation to the Domestic Telex and TWX subscribers as a group.

7. Secondly the IRCs claimed that the cost to Western Union of providing TWX and Telex services to the IRC is significantly lower than the cost of providing these services to the general public. So, say the IRCs, they were entitled to the historical percentage discounts they have previously received under the interconnection arrangement contracts (see Footnote 5 *supra*).

8. On March 17, 1978, the Commission issued its first Designation Order in this case (67 FCC 2d 1421). There they placed WU's December 1, 1977 tariff filing in issue. They suspended those revisions for maximum statutory period and called for an investigation to determine: (1) whether those revisions were just and reasonable under 47 USC 201(b); and (2) whether they were nondiscriminatory under 47 USC 202(a). The Commission also set down the contingent standard 47 USC 205 prescription issue.

9. In that first Designation Order the Commission outlined three specific problems that needed to be explored. First, it pointed to Western Union's own projected rate of return figures for Telex and TWX and expressed its concern about the excessiveness of such figures.[6] Secondly, it observed, with concern, that ". . . it is obvious that Western Union is utilizing the high returns on Telex and TWX

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[6] Western Union submitted the following estimated pre-and-post rate of returns in support of its filings:

	Telex		*TWX*		*Telex/TWX*		*Overall*	*Company*
Calendar Year	*Before Increases*	*After Increases*	*Before Increases*	*After Increases*	*Before Increases*	*After Increases*	*Before Increases*	*After Increases*
1977	18.8%	18.8%	16.3%	16.3%	18.1%	18.1%	6.5%	6.5%*
1978	17.7%	19.1%	5.8%	6.8%	13.9%	15.1%	4.5%	5.0%
1979	18.9%	20.8%	3.9%	5.2%	13.3%	14.9%	4.2%	4.9%
1980	20.6%	22.7%	8.5%	10.3%	16.0%	17.9%	5.7%	6.5%
1981	23.4%	25.7%	16.3%	18.8%	20.6%	23.0%	7.7%	8.8%

* The Commission noted that WU, in its January 3, 1978 report to the Commission reported an overall return of 7.6% for the 12 months ended September 20, 1977. So these estimates are probably understated.

services to offset, wholly or in part, losses or deficient returns incurred on PMS, Mailgram, and various competitive services, as well as non-communications services." Consequently, the Commission called for a review of the previously allowed 18.92% return on investment for Telex and TWX with a view to amending that prescription if warranted.

10. Third, and finally the Commission called for an inquiry into the reasonableness of Western Union's cost allocations. It called for allocations consistent with the standards laid down in Docket 18128 and specifically called for ". . . a further allocation of costs and revenues with respect to the 'all other services category' so that we may determine specific returns for the communications and non-communications services included therein, and resultant cross-subsidization, if any. . . ."

11. About two months later (on May 25, 1978), the Commission released its second designation order in this case (68 FCC 2d 98). There it examined Western Union's December 2, 1977 filings (see para. 4 *supra*). And it observed that the public and IRC interconnected Telex and TWX are essentially one and the same service and that any cost differences which can be shown to exist "are minor from an overall system point of view."[7]

12. But the Commission further noted that the possible unlawful increases in Telex's and TWX's overall rates of return ". . . are due in part to the projected revenue effect of the proposed IRC interconnected Telex/TWX tariffs. As essentially short-haul users, the IRCs would be contributing a substantial portion of the estimated overall revenue increases, since the proposed IRC tariffs raise the short-haul usage rates above previous levels. . . ."

13. The Commission then went on to add an additional issue; namely, to determine:

> "What formula for the division of charges for outbound IRC - interconnected Telex and TWX services should the Commission prescribe under Section 222(e) of the Act?"

And in line with its conclusion that the public and IRC interconnected Telex and TWX are essentially the same service, the Commission suggested that the public Telex/TWX tariff rates could serve as a benchmark for determining such a formula.[8]

14. On June 30, 1978, WU filed a third round of Telex and TWX

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[7] It is important to note that the Commission's observation in the Designation Order was just that - an observation. It wasn't a legally sustainable finding of fact or conclusion of law. The Separated Trial Staff, however, has treated it as such. See e.g. the Staff's June 27, 1980 Proposed Findings of Fact at para. 7. As will be noted *infra.* the only direct affirmative evidence on the subject (for better or for worse) was offered by the IRCs. No evidence was adduced to sustain the Commission's belief that any cost differences are minor.

[8] Both Designation Orders (67 FCC 2d 1421 and 68 FCC 2d 98) contain accounting orders.

rate increases. Those revisions were part of general overall rate increases. They were based on the then scheduled termination of existing WU - AT&T interchange facilities agreements on October 1, 1978.[9]

15. Western Union contended that when those agreements were terminated, AT&T would be furnishing facilities to WU at considerably higher rates. It estimated that it would have to pay $37 million more in facility costs, but that these June 30th revisions would pass about $17 million through to its customers.

16. Although it saw no need to add any more issues the Commission determined that the June 30, 1978 round of TWX-Telex increases fell within the scope of this investigation and called for an inquiry into their lawfulness. See 69 FCC 2d 924 released October 12, 1978.

17. Prehearing Conferences were held on May 10, June 7, and October 19, 1978, on May 30, 1979; and on August 21, and November 17, 1980. Thirty-seven days of hearings were held between January 3, 1979 (Tr. Vol. 4) and March 6, 1980 (Tr. Vol. 41). The record was closed initially on August 29, 1980. But it had to be reopened since no 47 USC 205 prescription evidence had been adduced. See October 29, 1980 Order (FCC 80M-2189). Further hearings were held between May 13, 1981 and September 25, 1981.

18. The Separated Trial Staff, Western Union, and American Facsimile Systems, Inc. (AFSI)[10] filed their initial Proposed Findings of Fact and Conclusions of Law on June 27, 1980. The IRCs jointly filed their initial set of Findings and Conclusions the same day. All parties filed their initial Reply Findings on September 15, 1980.

19. As a result of the reopened record the parties filed Supplemental Proposed Findings of Fact and Conclusions of Law on November 2, 1981 and Reply Findings on November 18, 1981.[11]

Threshold Ruling

20. As previously noted, this is a partial (Phase 1) Initial Decision. It will contain findings and conclusions on the three tariff filings previously described (see paras. 3, 4, and 14 *supra*). It does not involve Western Union's fourth set of tariff revisions that became effective on May 1, 1981 (the postalized tariff).

21. Moreover, because the postalized tariff became effective May 1, 1981, this Phase 1 Decision will not prescribe rates for the future

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[9] Although the anticipated contract termination caused WU to file higher rates for many services, the Commission only set the Telex and TWX rate revisions for investigation.

[10] AFSI is a competitor to Western Union Permit Service's non-regulated truck permit business. It was granted intervention in this proceeding on July 17, 1978. See FCC 78M-903 released June 6, 1978 and FCC 78M-1065 released July 17, 1978.

[11] AFSI didn't participate in the reopened Phase 1 hearings.

under the 47 USC 205 prescription issue. That prescription can only be done in Phase 2. However, the prescription evidence adduced will be used to determine what the legal rates should have been between August 10, 1978 and May 1, 1981.

Proposed Findings of Fact
The Telex and TWX Rate Structure

22. *Telex*. Telex is a teletypewriter exchange service. It operates at transmission speeds up to 66.67 words per minute and uses a code that is compatible with world-wide standards.

23. Domestic Telex subscribers can dial each other directly in the contiguous United States, Mexico, Canada, and Alaska. They can communicate with overseas Telex users by connections through an IRC. This includes Hawaii, Puerto Rico, and the Virgin Islands. At the end of 1977 there were about 62,000 Telex subscribers. This increased to 67,293 subscribers at the end of 1978, and about 77,000 at the end of 1980.[12]

24. Three principle rate components make up Telex charges: (1) a terminal equipment charge; (2) a usage charge;[13] and (3) an access charge. "Access" relates to the facilities and the associated services that the carrier provides to allow customers to reach its Telex (or TWX) interexchange network. There are two types of "Access" charge - "Local Access" or "Remote Access." "Local Access" charges are levied where the customer's premises is located in a city where Western Union maintains a terminating device that permits the customer to enter the desired network. The "Local Access" charge covers: (a) the line between the customer's premises and WU's terminating device; (b) the equipment located at the customer's premise other than a terminal device; and (c) associated maintenance services.

25. "Remote Access" charges are levied in instances where the subscriber is located in a community where WU doesn't maintain a terminating device. There Western Union charges the customer for a line between his station and the nearest city where a WU terminating device is located.

26. The Telex rate revisions involved here are summarized in the following chart:

Telex Charges

	Pre-December 1st 1977	*December 1st 1977 Filing*	*June 1977 Filing*
Terminal Equipment Monthly Charge	$66.50	$66.50	$66.50
Local Access Monthly Charge	$27.00	$27.00	$30.00

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[12] See CC 000522 released April 30, 1981 at Footnote 5.

[13] The usage charge is roughly equivalent to a "time-of-use-line" charge.

	Pre-December 1st 1977	*December 1st 1977 Filing*	*June 1977 Filing*
Remote Access			
Per Mile Monthly			
1-10 Miles	**.00**	**.00**	**$1.50**
11-110 Miles	**$1.47**	**$1.47**	**$1.50**
Usage Rates			
Per Minute			
Step A	**$0.175**	**.225**	**.225**
Step B	**.30**	**.375**	**.450**
Step C	**.45**	**.375**	**.450**
Step D	**.60**	**.525**	**.525**

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27. As the chart above shows, historically the Telex usage rates had four rate steps. The country has been divided into twelve zones. By checking a Zone Chart the subscriber can determine which Rate Step his Telex message falls under. For example, a Telex subscriber in Colorado (Zone 9) sending a Telex message to a subscriber in Georgia (Zone 2) could ascertain that he must pay a Step D usage rate.

28. In the December 1, 1977 filing, WU actually cut the number of rate steps from 4 to 3 by combining Steps B and C. And as previously noted, it has raised its short-haul (Step A) rates and decreased its long-haul (Step D) usage rates. In the June 1977 filing Western Union increased the charges for Telex calls from United States to Canada and "postalized" at $.75 per minute. While Telex charges are quoted at a rate per minute, they are actually billed on a fractional minute (1;10 minute) basis.

29. *TWX*. TWX is a teletypewriter exchange service. It operates at a transmission speed of up to 100 words per minute. TWX subscribers can directly communicate with each other, but *direct* communications are limited to the contiguous United States and Canada. At the end of 1977 Western Union had about 52,000 TWX subscribers. This increased to 54,481 at the end of 1978, and about 56,000 at the end of 1980.

30. The same rate components that make up Telex charges make up TWX charges (see paras. 24–25 *supra*). The TWX rate revisions involved here are summarized on the following chart:

TWX Charges

	Pre-December 1st 1977	*December 1st 1977 Filing*	*June 1977 Filing*
Terminal Equipment			
Monthly Charge	$79.00	$79.00	$79.00
Local Access			
Monthly Charge	$16.50	$16.50	$16.50
Remote Access			
Per Mile Monthly	$.50	$.75	$1.50

	Pre-December 1st 1977	*December 1st 1977 Filing*	*June 1977 Filing*
Intra-U.S. Usage Rate Per Minute (5 Rate Steps)			
Minimum	$.20	$.30	$.30
Maximum	$.70	$.52	$.52

31. Unlike Telex, TWX calls are billed on the basis of duration (full minutes) and mileage.[14] Before December 1, 1977 there were 11 mileage rate steps with charges ranging from $.20 to $.70/mile. After the December 1st, 1977 rate change became effective, the number of rate steps decreased to five with charges ranging from $.30 to $.52.[15]

32. Back at the time Western Union was seeking authority to purchase TWX from AT&T it represented to the Commission that it was committed to establishing an on-line or conversational TWX/Telex interconnection. See *Western Union Telegraph Co.*, 24 FCC 2d 664, 672 (1970). But Western Union has never lived up to that representation and even today a domestic Telex and TWX subscribers are not able to "talk" to each other in a conversational manner—that is, the ability to receive a message as it is being transmitted. If a domestic Telex subscriber wants to connect with a TWX subscriber (or vice versa) he must use Western Union's ancilliary Infomaster service; i.e., the store-and-forward service. And there is an additional charge to use Infomaster.[16] [17]

The 47 USC 201(b) Just and Reasonable Issue

33. Under the designated 201(b) issue we must determine whether the charges, classifications, practices and regulations published in the previously described tariffs were unjust and unreasonable. And the burden of proving that the rate revisions were just and

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[14] However, the TWX *mileage* steps and the Telex *zone* steps produce the same result; i.e., the cost per mile to the customer decreases as the length of the message haul increases. Western Union witness, Richard Linde, admits that the Telex zone steps have no relevance today as far as the cost of providing Telex service is concerned (Tr. 3753).

[15] The $.30 per minute rate applies to TWX messages up to 40 miles in length; for 41 to 124 mile messages the per minute rate is $.40; for 125 to 354 miles the rate per minute is $.44 per minute; for the 355–1024 mile zone the per minute rate is $.48 and for message distances of 1025 miles and over the rate per minute is $.52.

[16] Infomaster is tariffed under the names Teletypewriter Computer Services (TCS) and Telex Computer Services (TCS). When Infomaster is used Telex/TWX interconnection, the Telex zonal rate structure applies and not the TWX mileage band structure.

[17] This is an unhealthy situation for the TWX/Telex ratepayers. For as long as Western Union can collect the additional Infomaster revenues for a TWX/Telex interconnection there is no incentive for it to live up to its 1970 TWX/Telex "conversational" commitment to the Commission.

reasonable fell on the initiating carrier. The record demonstrates that Western Union totally failed to sustain that burden.

34. *WU's Failure to Relate Rates to Costs.* The Commission expressly indicated that it expected Western Union to show that its TWX and Telex rate revisions were reasonably related to the cost of providing those services. In other words it expected WU to justify its rate revisions under the standards it laid down in Docket 18128.[18] See 61 FCC 2d 587 (1976) and Finding para. 10 *supra*.

35. Western Union not only failed to develop the actual full cost of providing Telex and TWX services, it never even attempted to do so (Tr. 491, 549–550, 551, 920, 3359, 3573–3574, 4009,[19] and 4291). It didn't know and didn't seem to care what TWX and Telex costs are by length of haul. Nor was it concerned that the return for the three service elements; i.e., Terminals, Access, and Usage, varied so widely.

36. For example, TWX *remote access* charge went from $.50 to $.75 in the first filing and from $.75 to $1.50 in the second filing without any attempt on WU's part to justify those increases in terms of cost of service. The same thing holds true for the $3 Telex monthly *local access charge* increase from $27 to $30 (WU Ex. 5, p. 33; Tr. 557, 559–560, 566–568, 570, 588).

37. But most importantly, the revisions in the TWX and Telex mileage *usage* rates were never justified in terms of costs, and WU made absolutely no effort to so relate them.[20] (WU Ex. 5, pp. 20, 26, and 31; Tr. 549, 584, 886–887, 919–924, 1465, 1468, 1470, 1922 and 1975).

38. Consequently, having failed to relate or even to try to relate either the TWX or Telex rates or any of their service elements to the cost of providing the service, it must be found that WU has failed to meet its burden of proof under 47 USC 201(b). So its 1977–1981 rate revisions must be rejected.

39. *The Discredited Alignment Theory.* Instead of establishing cost based rates Western Union simply tried to align TWX and Telex rates with each other and with AT&T's MTS service (WU Ex. 5, pp. 20, 25). That type of ratemaking is inappropriate. It clearly violates

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[18] In fact cost-related rates were the standard even before Docket 18128. As the Commission said in the *Competitive Carrier Rulemaking* proceeding (85 FCC 2d 1, 19): ". . .at least since our decision in the *Private Line Case*, 34 FCC 217 (1963). . ., We have consistently enunciated a policy which employs costs as the touchstone for determining the justness and reasonableness of rates."

[19] In fact, one Western Union witness - Richard Linde - frankly admitted that the Company's TWX and Telex rates are "market oriented." And the record supports the additional conclusion that Western Union's own data shows that during the 1977–1981 time period there was a high degree of price inelasticity for TWX and Telex (Tr. 5264).

[20] Western Union Richard Linde conceded that sufficient data could be obtained to determine TWX and Telex usage costs by mileage. But he indicated that such rates are ". . .a market directed price basically, not a cost based price."

established Commission policy and is patently illegal. See *American Telephone and Telegraph Co.*, 59 FCC 2d 671, 703 (1976).[21] [22]

40. *Western Union's Failure to Separate Interstate Data.* Based on Findings 34–39 *supra*, there is really no need for any further inquiry into the 47 USC 201(b) issue. In Docket 18128 and again in Docket 20814[23] the Commission has expressly held that costs will be the primary criteria for determining whether a carrier's charges are just and reasonable. Western Union has not only ignored those holdings it has deliberately employed a rate-making theory (the alignment theory) the Commission has rejected. So there is really no need to look further at Western Union's rate presentation.

41. However, *assuming* that a further analysis of WU's presentation were in order, the data it has submitted is deficient. The rate revisions involved here are *interstate* services. However, with one exception (Public Telegram Service), Western Union has only presented data that is based on system-wide operating results. So it hasn't presented data that can be broken down in an auditable manner. Such data is available.[24] The Company makes an annual separation study for all services that separates total company results into interstate and intrastate. Moreover, WU separates intrastate and interstate Telex and TWX revenues for its state rate proceedings. It simply chose not to introduce them.[25] So there is no legitimate excuse for the company presenting unauditable results.

42. *Western Union's Defective Cost Allocation Studies. Assuming* that Western Union had complied with the Commission's Docket 18128 standards; *further assuming* that it hadn't based its rates on the discredited alignment theory; and *further assuming* that it had properly disaggregated TWX and Telex interstate data from the total system results, it would still have to be concluded that WU

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[21] There the Commission concluded that AT&T's alignment theory discriminated against short-haul WATS users.

[22] Moreover such an alignment is inconsistent with the record since Telex and MTS aren't considered competitive offerings and recent MTS rate changes didn't affect Telex growth (Tr. 504; 842–843).

[23] *In the Matter of American Telephone and Telegraph Company*, 74 FCC 2d 1 (1979). Western Union participated in both Dockets 18128 and 20814.

[24] Western Union witness, Richard Linde, indicated that an interstate-intrastate separations study would show a lower rate of return for *intrastate* Telex and a correspondingly even higher *interstate* return (Tr. 4234–4235). It wasn't until the prescription aspect of the case arose (para. 17 *supra*.) that the IRCs were able to secure sufficient data to present an intrastate-interstate breakdown. This will be discussed when the 47 USC 205 issue is analyzed *infra*.

[25] Western Union asserts that it lacks confidence in the accuracy of its own intrastate-interstate TWX and Telex separations and that they can't be used without major adjustments. This assertion is rejected. WU has submitted such separations studies under oath to some 43 state utility commissions. If they can swear to the truth and accuracy of that material before those commissions, it can be used for our purposes here. It's the best available evidence on the separation of intrastate-interstate TWX and Telex revenues. This will be discussed further *infra*.

failed to demonstrate that its 1977–1981 rate revisions were just and reasonable.

43. First of all the record demonstrates that in the tariff support material it did present Western Union grossly overstated the amount of Digital Exchange System (DES) investment allocable to the Telex service. Similarly it also overstated the DES expenses allocable to that service[26] The result was that the Telex rate base was greatly inflated[27] (WU Ex. 13, p. 5; IRC Ex. 4, pp. 11–14; Tr. 1572, 1620–1622, 1663, 1666, 1755, 1879, 2115–2116, 2361–2362, and 2830–2831).

44. Secondly WU entered into a questionable transaction with one of its affiliates, Western Union Teleprocessing, Inc. (TI) for the building of DES. As a result the equipment that TI provides may result in the Telex rate base being overstated by some $4.8 million (WU Ex. 4A, pp. 2–3; TS Ex. 13, p. 1; Tr. 1600–1610, 1640, 1657, 1855–1856).

45. In addition, in determining its revenue requirement Western Union allocated a federal income tax requirement expense although the parent, Western Union Corporation incurred no federal income tax expense in 1977 or 1978[28] (WU Ex. 3, p. 2; WU Exs. 4 and 4A; TS. Ex. 6, p. 15; Tr. 3146, and 4786–4790).

46. Finally it should be noted that Western Union has developed no reasonable methods for verifying the cost study results it did submit. It hasn't used sound statistical procedures to develop its sampling methods; it allocates certain investment and expense categories simply on the basis of "departmental advice";[29] and the special studies it used to allocate certain investment categories were either outdated or were based on erroneous assignment assumptions.[30]

47. Because Western Union failed to relate its 1977–1981 Telex

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[26] Some of WU's existing indirect allocation procedures tend to assign too few costs to TWX and Telex. But one can't tell precisely from this record whether this balances the overinvestment. However, IRC witness Gildea's DES adjustment (see Prescription section, *infra.*) seems conservative and has been accepted as a valid adjustment.

[27] In fact for the year 1977 Western Union erroneously assigned *all* DES investment to Telex (Tr. 2115; 2361–2362).

[28] Thus, on the return of investment (ROI) reports, the "pre-tax" return on investment is the *actual* return on investment.

[29] Some internal Western Union department calculated a percentage distribution for the Company's various services and then gave it to the person or persons responsible for making the allocation. In at least one instance "Labatory Equipment - Account 1078" the advising department's work papers weren't even available. Such "departmental advice" is especially dangerous when you consider that one of the Company's major rate objectives was to *align* its own Telex and TWX rates with AT&T's MTS service.

[30] The direct allocation assignments are so arbitrary and unauditable that they allow Western Union's management unlimited discretion to conform the return-on-investment studies to whatever suits their purposes. This approach violates Docket 18128's costing principles. See 61 FCC 2d 587 (1976).

and TWX rate revisions to the cost of providing the service; because it established its TWX and Telex rates on the basis of the inappropriate alignment theory; because it didn't bother separating interstate TWX and Telex data from the total data available; and because, even on the cost study materials it did submit, it employed allocation procedures which overstated Telex investment and expenses, it must be concluded that Western Union has failed to sustain both its burden of proceeding and its burden of proof under the 47 USC 201(b) issue.

The 47 USC 202(a) Unreasonable Discrimination Issue

48. The Commission has called for an inquiry to determine whether the 1977–1981 TWX and Telex rate revisions subjected any person or class of persons to an unjust or unreasonable discrimination or gave any person, class of persons or locality any undue or unreasonable preference or prejudice.

49. *Discrimination Against Short-Haul Users*. This is the core-problem of this proceeding. The record demonstrates that during the time period in question Western Union employed a rate structure for its usage rates that discriminate against the short-haul user.

50. Western Union admits that the costs associated with the TWX and Telex usage rates weren't mileage sensitive.[31] The cost *per mile* to furnish such service didn't decrease as the mileage distance between the service points increased. In other words it cost Western Union the same amount of money to furnish a mile of usage whether it was the 11th mile, the 183rd mile or the 256th mile. So if Western Union had constructed TWX and Telex usage schedules that were properly related to the cost of furnishing usage the subscriber who transmitted a 200-mile message would have paid a usage rate that *was* 20 times as much as the subscriber who transmitted a 10-mile message. But the *cost per mile* to each one of them would have been the same.

51. But Western Union didn't construct usage rate schedules that were reasonably related to the cost of furnishing such usage. In fact it constructed usage charges directly contrary to what it has admitted the facts were (see para. 50 *supra*); i.e., WU constructed usage rate schedules that assumed that the cost per mile of furnishing TWX or Telex service decreased as the length of haul increased. The net result is that the short-haul users bore the brunt of furnishing the usage revenues that the long distance subscriber should have been helping provide. The following rough examples illustrate the "before" and "after" December 1977 usage charges:

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[31] The term "mileage sensitive" has been used instead of "distance sensitive". The term "distance sensitive" has taken on a different meaning with the advent of satellite transmissions.

CHARTS
TWX Usage Charges
Pre-December 1, 1977 Rates

Message Miles	*Rate × Minutes of Usage*	*Cost Per Mile to the Customer*
20	$.20 × 10 = $2.00	$2.00¢ 20 mi. = 10.0¢ per mile
100	$.25 × 10 = $2.50	$2.50¢ 100 mi. = 2.5¢ per mile
600	$.50 × 10 = $5.00	$5.00¢ 600 mi. = 0.83¢ per mile
1200	$.60 × 10 = $6.00	$6.00¢ 1200 mi. = 0.5¢ per mile

Post-December 1, 1977 Rates

Message Miles	*Rate × Minutes of Usage*	*Cost Per Mile to the Customer*
20	$.30 × 10 = $3.00	$3.00¢ 20 mi. = 15.0¢ per mile
100	$.40 × 10 = $4.00	$4.00¢ 100 mi. = 4.0¢ per mile
600	$.48 × 10 = $4.80	$4.80¢ 600 mi. = 0.80¢ per mile
1200	$.52 × 10 = $5.20	$5.20¢ 1200 mi. = 0.43¢ per mile

52. The rudimentary charts above show plainly what was going on. Before the December 1, 1977 TWX (and Telex)[32] rate revisions, the short-haul users were already bearing the brunt of WU's TWX and Telex usage revenue requirements. They were carrying substantially more than their fair share.

53. WU's post-December 1977 filings only made matters worse for the short-haul users. WU increased the short-haul rates substantially and further decreased long-haul rates. This only exacerbated the unreasonable discrimination that already existed.

54. Western Union argues that by cutting down on the number of rate zones and mileage steps that it simplified its rate schedule. But this argument completely misses the point. Since usage costs were not mileage sensitive, *any* decreasing or increasing rate step schedule was discriminatory. So *both* the pre-December 1977 usage rates and the post-December usage rates blatantly and unreasonably subjected the short-haul users to rate discrimination.

55. Moreover, this record reflects that short-haul users were discriminated against in still another way. During the Phase 1 hearing Western Union made no effort to justify the $1.50 per mile per month remote access charge[33] (see paras. 26 and 30 *supra*). Nor did it try to relate the $16.50 TWX and $30 Telex monthly local access charges to any discernible costs.

56. But now it appears that WU deliberately and substantially

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[32] Similar charts could be constructed for Telex. Part of the problem involved is that Western Union changed its TWX usage rates on the completely unfounded assumption that AT&T rate charges for its MTS schedule put TWX at a "competitive price disadvantage" at certain mileage levels (WU Ex. 5, p. 20; and Footnote 22 *supra*.).

[33] The only justification that WU offered for raising the remote access charge was the totally unsupported statement that "costs are severe in this area" (WU Ex. 5, p. 24; Tr. 557–560). WU did believe that the $1.50 monthly per mile charge didn't cover the cost of providing remote service (Tr. 566–567).

understated the $1.50 remote access charge as well as the monthly local access charges.[34] And it made up the revenue short fall on these two rate components through its discriminatory usage pricing structure. This, of course, placed an additional discriminatory burden on the short-haul usage subscriber.

57. The following chart demonstrates[35] this point:

CHART

Rate of Return by Tariff Component

	1977 (Actual)		*1978 (Forecast)*	
	Telex	*TWX*	*Telex*	*TWX*
Terminal Charges	19.2%	5.8%	15.8%	4.8%
Access Charges (Remote and Local)	7.2%	(234.8%)	(1.2%)	(231%)
Usage	18.5%	82.3%	15.33%	34.42%

58. The previous findings (paras. 49–57 *supra*) justify the intermediate conclusion that the post-December 1977 usage rates discriminated most heavily against the complaining IRCs. Overseas Telex usage accounted for 53% of WU's Telex Network usage and 35% of its TWX Network usage. And it is undisputed that the IRCs were essentially short-haul users (para. 12 *supra*). So they bore the brunt of the post-December 1977 rate revisions.[36]

59. The following data secured from Western Union[37] shows how that Company's discriminatory mileage step rate structure exploited the inelastic overseas Telex market:[38]

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[34] See CC 00522 released April 30, 1981 at para. 8 and Footnote 8. WU now estimates that the average cost per mile for remote access is about $3.70 and that the monthly local access revenue requirement for Telex is between $50–69 and for TWX is $46–59.

[35] This doesn't mean that WU's forecasting procedures can be accepted. In fact this record shows them to be just the opposite. See Trial Staff 1st set of Proposed Findings at paras. 53–66. However, they have been used in the Chart above to show the general rate of return relationship and not for precision.

[36] Before the December 1977 rate filings the IRCs were always able to recoup at least some portion of WU's short-haul burden via the division of charges agreements (see Footnote 5 *supra*). While this may have alleviated the IRCs' burden, the other short-haul users still got hit with the discriminatory charges.

[37] These are the so-called withheld studies that first surfaced during the prescription aspects of this case (see Footnotes 7 and 24 *supra*; Finding 17 *supra*; FCC 81M-1389 released May 4, 1981; and Tr. Vols. 44–45).

[38] WU acquired TWX from the Bell System on March 31, 1971 (see 24 FCC 2d 664 (1970)). That acquisition gave Western Union market share dominance in the domestic switched services area of telecommunications. This market dominance permitted it to exploit the inelastic overseas Telex market.

CHART

Return on Investment for 12 Months Ending June 30, 1977

	Intrastate	*Interstate*	*IRC*
ROT Excluding Infomaster Revenues	4.1%	15.0%	28.1%
ROI Including Infomaster Revenues	17.6%	15.9%	25.1%

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60. In addition, calculations based on other data that Western Union furnished after the record was reopened (Fn. 34 *supra*) paints an even more alarming picture of Western Union discrimination against the international Telex and TWX users:[39]

CHART

Return on Investment 1977-1979

	Intrastate	*Interstate*	*International*	*Total*
1977 Telex ROI	0.5%	10.3%	27.2%	14.8%
1978 Telex ROI	4.4%	14.8%	39.4%	21.7%
1979 Telex ROI	4.0%	15.3%	45.8%	24.0%
1977 TWX ROI	0.5%	63.6%	150.7%	71.9%
1978 TWX ROI	0.6%	56.4%	97.6%	56.4%
1979 TWX ROI	5.6%	31.4%	31.9%	27.3%

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61. In summary, Western Union's post-December 1977 rate revisions under investigation here were unjustly and unreasonably discriminatory and violated 47 USC 202(a). They therefore should be rejected.

62. *Interservice Cross Subsidization*. Back in 1971 (27 FCC 2d 515, 539–541, 549) the Commission authorized rates that produced an 18.92% pretax rate of return for Telex. It did so because it was ". . .confronted with unusual circumstances. . ." and it ". . .was only the basis of these unusual circumstances" that it could allow a rate of return of that magnitude. Western Union had instituted a program to modernize its overall plant and operations. So the Commission, in effect, was permitting Western Union to *temporarily* use its high returns on Telex and TWX to foot the modernization bill. See 27 FCC 2d 515 *supra* at paras. 59–61.

63. Later, in 1974 (49 FCC 2d 532 at 549–550), the Commission elected not to disturb that 18.92% rate of return. See Docket 19696. It found that WU's modernization plans were still continuing, and

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[39] Even though these rates of return are based on data originally gathered by Western Union, now that it has surfaced, WU still continues to assert that it is improper to use the work papers to segregate international costs. This assertion is rejected. Western Union's own studies that it uses for intrastate rate proceedings is the best evidence available. See Footnote 25 *supra*.

that the Telex and TWX rate increases that Western Union was seeking there would not cause either service's pre-tax of return to rise to unreasonable or unjust magnitudes in the near future.

64. But when Western Union filed the TWX and Telex revisions involved here the Commission viewed the filings altogether differently. See para. 9 *supra*. First of all it pointed out that based on WU's own estimates and even without the proposed rate increases the Telex rate of return would exceed 20% by 1980; and that with the rate increases it would exceed 25% by 1981. See Footnote 6 *supra*. It expressed its concern with those company estimates.

65. Secondly, it specifically referred to its Docket 19696 authorization (see para. 46 *supra*). And it said this: "While that decision prescribed a return of 18.92% for Telex and TWX, due in part to the deficiency in PMS earnings, 49 FCC 2d at 550, it at no time supported a theory that Telex and TWX services should subsidize other communications and non-communications service offerings of Western Union. Moreover, in light of the law or negative returns reported for services other than PMS, it appears that PMS may no longer be the primary cause of Western Union's overall company revenue deficiency and resulting low rate of return."

66. The record evidence confirms the Commission's worst fears. Based on Western Union's own figures (and without any adjustment) the following chart shows the Pre-Tax percent return on investment (ROI) for the twelve months ended December 31, 1977 and the twelve months ended December 31, 1978.

CHART
PRE-TAX PERCENT RETURN ON INVESTMENT

	Private wire services	Non-communication services	Hotline	Broadband	Telex	TWX	Mail-gram	Public message & other services	All services
ROI for 12 months Ending 12/31/77	1.4%	(22.3%)	4.7%	(21.4%)	17.8%	18.3%	(2.2%)	0.9%	7.5%
ROI for 12 months Ending 12/31/78	(1.4%)	94.1% *	4.8%	(19.5%)	17.2%	15.8%	5.4%	1.1%	6.9%

* The wide disparity in the non-communication services rate of return between 1977 and 1978 resulted from a substantial credit adjustment for depreciation expense for non-communication plan in December 1978.

67. The Chart above shows that Telex and TWX cross subsidize practically every other service Western Union offers. Not one other service offering, regulated or nonregulated, earns a rate of return as high as the overall return for all the services *except* TWX and Telex.

Stated another way, absent the inclusion of the TWX and Telex revenues the rate of return for all Western Union's other services would be drastically below the 1977 year end and 1978 year end 7.5% and 6.9% rates of return.

68. The other studies Western Union has submitted in this proceeding essentially corroborate the company's overall subsidization from Telex and TWX revenues. Its original 14 way cost study of 1977 operations shows an 18.18% rate of return for TWX, a 17.43% return for Telex and a - 2.14% for Public Message Service;[40] a second 14 way cost study showed a 1978 rate of return of 15.22% for TWX, a 16.45% for Telex, and a - 1.93% for PMS;[40] and the Western Union FDC Method 7 shows a 1977 rate of return for TWX of 17.1%, 18.2% for Telex, a - 2.7% for PMS, and a - 9.8% for the other non-regulated category.

69. Western Union takes the position that as long as Telex and TWX rates "are not priced higher than competition will allow" and as long as it isn't a fair rate of return overall, the TWX and Telex rates can't be considered excessive. WU witness, Richard Linde, argues - despite the Designation Orders' directives (see Findings 64–65 *supra*) - that the Commission should concern itself with the combined rate of return of the Integrated Record Message Services (Telex, TWX, PMS, and Mailgram); and that if the IRCs category isn't earning an excessive return, there is no cross-subsidization of other services.

70. This argument can't be credited for any one of several reasons. In the first place Linde is merely quarreling with the policy decision set out in the Commission's designation order; i.e., that the Commission should not be seriously concerned that TWX and Telex are cross-subsidizing other communications and non-communications service offerings.[41]

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[40] Western Union submitted a 14 way cost study format that didn't display actual rates of return. However, the data was submitted in a way that permitted the rate of return to be calculated. See Trial Staff Initial Findings at paras. 55–56 and Fn. 17.

[41] In addition, the Commission released a Notice of Inquiry and Proposed Rulemaking in CC Docket 79–252. See FCC 79–599 released November 2, 1979. There it again specifically expressed its concern with WU's cross-subsidization. And at para. 88 of that Notice, it said this:

> "We also note several pending proceedings which could affect substantially Western Union's role in the marketplace, particularly its dominant posture in Telex/TWX services. For example, in our *Telex/TWX Investigation*, CC Docket 78–97, 67 F.C.C. 2d 1420 (1978), we are already examining the cross-subsidization problem in some depth. As noted in *Telex/TWX supra*, at 1424, Western Union's projected 1981 earnings of 25.7% and 18.8% on Telex and TWX services, respectively, (as well as projections for 1979 and 1980) seem excessive when compared to either significantly low earnings or negative earnings on its other services. This factor, coupled with several *Telex/TWX* rate increases in recent years, *Telex/TWX*, *supra*, causes us concern about the cross-subsidization

71. Secondly, Linde's argument assumes that even though it already has had 10 years to modernize its plant (Findings 62–63 *supra*),[42] the Commission should continue letting the TWX and Telex ratepayers carry the albatross PMS.[43] There is no valid reason for that assumption.

72. And third, Western Union's *own* figures show that the Commission should be deeply concerned that the Telex and TWX rate-payers are carrying other services as well as PMS. See Findings 66–67 *supra.*[44]

73. In summary the record evidence warrants the following cross-subsidization conclusions: The International and Interstate Telex and TWX short-haul usage users are not only cross-subsidizing the Intrastate Telex and TWX users (para. 60 *supra*), and WU's PMS users (paras. 66 and 68 *supra*), they are cross-subsidizing almost every other service the Company offers (paras. 66 and 68 *supra*). Moreover, WU has not only seriously underestimated its 1978 and 1979 Telex and TWX rates of return (compare Footnote 6 with para. 60 *supra*), its Telex and TWX rates of return even *greatly* exceed the 18.92% the Commission allowed back in 1971 and affirmed in 1974 (compare para. 60 *supra* with paras. 62–64 *supra*).

74. Overall the record demonstrates that during the 1978–1981 period in question Western Union employed a step usage rate structure that blatantly discriminated against the short-haul user. Those usage rate schedules discriminated most heavily against the complaining IRCs who were essentially short-haul users (see Findings paras. 49–61 *supra*). In addition, and during this same time period Western Union used its TWX/Telex monopoly services to cross-subsidize both its other regulated and non-regulated services (see paras. 62–73 *supra*). Either discrimination; i.e., the short-haul discrimination or the improper cross-subsidization forms an indepen-

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problem. To get at the heart of the problem, we are thus considering the establishment of guidelines and principles similar to those promulgated in Docket No. 18128 for AT&T, to govern Western Union's cost allocations among its services. Hopefully, the Telex/TWX Investigations will provide sufficient basis for the development of cost allocation principles and guidelines, as well as addressing the rate of return for Telex and/or TWX services." (Footnote omitted.)

[42] Indeed WU has modernized its plant to the point where it has padded its rate base with excess capacity DES investment. See DES discussion *infra.*

[43] As the Trial Staff points out, the Commission has never forced Western Union to maintain the unprofitable PMS service. In fact just the opposite is true. The Commission - at some expense to the American taxpayer - has been more than sympathetic toward public message office closures, and public message office consolidations.

[44] In addition Western Union engages in a truck permit business through an internal organization known as Western Union Permit Service (WUPS). The permit service is a non-tariffed, non-regulated service. However, the record shows that WU uses its TWX/Telex services, equipment and facilities to cross-subsidize the non-regulated truck permit operations. This is an unreasonable and predatory use of its TWX/Telex monopoly power.

dent ground for rejection under 47 USC 202(a). So, *even if* Western Union had met its burden of proceeding and burden of proof under the 47 USC 201(b) Issue (see paras. 33–48 *supra)*, it failed to demonstrate that its TWX/Telex rates met the unreasonable discrimination provisions of 47 USC 202(a), and the 1977–1981 Western Union rate revisions are properly rejected.

The Division of Charges Formula Issue

75. In its second Designation Order (see Findings 11–13 *supra*) the Commission called for an inquiry into what formula should be prescribed for outbound IRC interconnected TWX/Telex services.

76. A certain amount of evidence was taken on this issue. However, in the interim, Congress passed "The Record Communications Act of 1981, Public Law 97–130." Under that Law the Carriers are required to negotiate among themselves on the cost and terms of interconnection. The Law also provides that if the Carrier, after negotiating in good faith, can't agree then the Commission itself must prescribe such arrangements by April 8, 1982.

77. Passage of this Law led *all* the parties to the proceeding (including the Separated Trial Staff) to contend that Congress and the Commission between them had effectively mooted the *designated* international formula issue in this case (see Tr. Vol. 55, January 13, 1982). Congress did so by passing P.L. 97–130, and the Commission did so by electing to use its Chief, Common Carrier Bureau (as opposed to its Separated Trial Staff and ALJ) to implement its terms. Stated another way, under P.L. 97–130 it is the Commission itself that must prescribe by April 8, 1982 (if the parties haven't reached agreement) and not the Presiding Officer in this case.

78. Based on this analysis (paras. 75–77 *supra*) it's concluded that the international formula issue set down at para. 13 of this Phase I Decision is moot.

79. *The IRC Rate Differential Presentation.* However, since the evidence that has been adduced is interrelated to both the 47 USC 201(b) just and reasonable issue *supra*, and the 47 USC 205 prescription issue *infra*, it is appropriate to analyze that evidence at this juncture.

80. As noted previously (para. 11 and Footnote 7 *supra*) when the Commission designated the international formula issue, it did so on the unsupported belief that any cost differences between Public and IRC interconnected rates ". . . are minor from an overall system point of view." And, operating under this mistaken belief it placed the burden of showing that any substantial threshold cost differences existed on the IRCs and not on Western Union. See 68 FCC 2d 98 at para. 70 and Footnote 41.[45]

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[45] Despite Footnote 41 at 68 FCC 2d 98 it remains a mystery why the Commission placed the burden of showing the cost differences on the IRCs. After all it was

81. Thus, only the IRCs presented any direct affirmative evidence on the subject. Western Union and the Separated Trial Staff attacked the IRC presentation. But they presented no affirmative showings of their own.[46]

82. Later, during the prescription discovery aspects of the case, the IRCs obtained data from Western Union that essentially *corroborated* their direct affirmative cases. See paras. 59–60 and Footnote 37 *supra*.

83. Even though it has offered no prescription evidence of its own on the subject, the Trial Staff attacks the IRCs' use of Western Union's own studies. They assert that such studies contain deficiencies. And they assert (at T.S. Supp. P.F., Footnote 28):

> "That Western Union was in the unfortunate position of disavowing its own studies is not good reason to cast doubt on the validity of the deficiencies which it found therein."

84. The Bureau's assertion completely misses the point. The studies that the IRCs relied on were not only prepared by Western Union, the Interstate separations studies were submitted under oath to some 43 state utility commissions. Western Union, in an effort to obtain an *intrastate* TWX/Telex rate revision, was more than willing to swear to the truth and accuracy of those studies. They can't be permitted to disavow those sworn submissions now. To permit them to do so would be unfortunate (see paragraph 41 and Footnote 25 *supra*).

85. IRC witnesses, Figley, Van Slyke and Jockers presented specific and detailed evidence on the cost differentials between the IRC and the Public Telex rates. Essentially, that evidence stands as the only affirmative available record presentation on the subject.

86. That evidence shows that there was a significant cost difference in furnishing Public and IRC interconnected rates. These cost differences arose because the two services were provided differently. For *domestic* Telex/TWX, Western Union provided a complete end-to-end service between two subscriber terminals. But in the case of *international* service interconnection with the IRCs was by trunk rather than by a subscriber line. And Western Union

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Western Union - and only Western Union - who had the cost data on a *domestic* TWX/Telex message originating at a given Gateway point and terminating at a given Hinterlands point. The IRCs were certainly not privy to such costs. And Western Union also would have the cost data for the domestic segment of an IRC connected TWX/Telex message between the same pair of points. So, as a matter of both law and common sense, the burden of proceeding should have been placed on the only party with the relevant facts in its possession - Western Union.

[46] The record was reopened on October 29, 1980 so the IRCs and the Trial Staff could prepare and submit their 47 USC 205 prescription evidence. See FCC 80M-2189. Even after it was given this additional opportunity to present *affirmative* evidence on the subject the separated Trial Staff failed to do so.

terminated its part of the service at IRC non-blocking switches instead of at a customer Telex terminal device.

87. These physical differences in furnishing domestic and international service produced the following differences:

> (1) Since, in the international service, Western Union interconnected with IRC non-blocking switches there were shorter set up times and a much higher call completion ratio; this resulted in a much less non-billable use of Western Union's Telex/TWX facilities in proportion to billable time;
>
> (2) Since the IRCs were interconnected on a trunk basis, only one-half as much concentration[47] was required for international messages as for domestic messages; and
>
> (3) Since, in international service, there were larger time zone differences between the origin and termination stations, a significantly larger percentage of inbound international calls were transmitted during off-peak periods and therefore didn't affect the sizing of Western Union's Telex and TWX networks.[48]

88. The IRCs also contended that there were other cost differences between IRC and domestic Telex/TWX traffic which couldn't be quantified because of the lack of relevant data, and other differences which could only be quantified to the extent of comparing the amount of specific types of traffic of plant used for each minute of IRC traffic with that used for domestic traffic. In the final analysis the IRCs claim that during the 1978–1981 time period it cost Western Union about 23% less to handle inbound IRC traffic than to handle domestic traffic and over 20% less to handle outbound IRC traffic.

89. Both Western Union and the Trial Staff have vigorously attacked the IRC presentation. But those attacks must be rejected. The IRCs propose rate adjustments based on costs. The costs they

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[47] The Trial Staff asserts that there may have been some operational differences under the old Telex system with regard to the use of concentrators, but that the difference is not applicable to the EDS and DES systems and can't be considered substantial (see T.S. P.Fs at Conclusion 111). The Presiding Officer can find no record support for this assertion. In any event, we are here (in Phase I) adjudicating the 1978–1981 rate revisions-before DES was cut in for "postalized" purposes. The Trial Staff itself agrees that Western Union greatly overstated DES investment and expenses attributable to TWX/Telex. Moreover, the Presiding Officer is satisfied that IRC witness Gildea has come up with a reasonable way of allocating concentrator costs to the services in question for the time periods involved.

[48] The Trial Staff *incorrectly* argues that the Commission has found that no cost differences exist between public and IRC Telex/TWX service and it cites the second Designation Order (68 FCC 2d 98 at 116 (para. 48)). While the choice of language used in that paragraph is poor, the short answer is that it doesn't constitute a finding of fact. If it had, there would have been no need for the Commission to call for evidence by designating an issue on the subject. The Designation Order language at para. 48 is nothing more than an *allegation* which is susceptible of being proved or disproved at the hearing the Commission called for. And the reality remains that the only *affirmative* evidentiary showing on the question of cost differences was made by the IRCs.

used was ultimately provided by or derived from information Western Union furnished. And given the errors, omissions, and plain distortions of the cost data Western Union provided, it is concluded that the IRCs showing on the cost differences between IRC and domestic Telex/TWX traffic is reasonable, and can be relied on for our purposes.

The 47 USC 205 Prescription Issue

90. *Background.* In its original Designation Order the Commission designated the following issue for hearing (67 FCC 2d 1421 at para. 16):

> "(c) If any of such charges, classifications, practices or regulations are found to be unlawful, whether the Commission, pursuant to Section 205 of the Act, should prescribe charges, classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed."

91. As previously noted, 37 days of hearing were held, but no evidence was adduced on this issue. Consequently the record had to be reopened and the IRCs and the Trial Staff were directed to present prescription evidence. See FCC 80M-2189 released October 29, 1980. The IRCs have complied with that direction. The Separated Trial Staff was unable to do so.[49]

92. A 47 USC 205 prescription is forward-looking; i.e., the Commission prescribes charges, classifications, practices and regulations for the future. However, when Western Union initiated a fourth tariff filing; i.e., its "postalized" tariff filing, and that tariff became effective on May 1, 1981, the parties agreed that the most orderly way to proceed was to bifurcate the case into (at least) two phases. Since this Phase (Phase 1) is designed to adjudicate the rates in effect between August 10, 1978 and May 1, 1981, the prescription evidence that has been adduced can be used for that purpose.

93. First it should be noted that the issue's condition precedent; i.e., the "if" clause, has been satisfied. Western Union's rate charges, rate classifications, rate practices, and rate regulations that were in effect during the relevant time period have been declared illegal. See Findings 33–47, and 48–74 *supra*. So we must now determine what the just and reasonable rates were.

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[49] The Trial Staff did submit certain testimony on what the fair rate of return for the Western Union Corp. should be. It concluded, based on Dr. Douglas Matthews' testimony, that the current (1981) fair rate of return for Western Union *is* 13.8%. However, since Dr. Matthews didn't address himself to what the fair rate of return *should have been* for the period between August 10, 1978 and May 1, 1981, that testimony - along with WU's rebuttal of same, hasn't been used. Instead WU's earlier *direct* presentation of Kosh and Lurito has been adopted; i.e., Western Union's contention that under the 1977 capital structure it was entitled to a 12.5% fair rate of return will be credited. Moreover, after analyzing the rate of return testimony submitted by Matthews, Kosh, and Lurito, the Presiding Officer has decided against prescribing a rate of return for Western Union in Phase 1. If such a prescription becomes necessary it can be done in Phase 2.

94. *The IRCs' Prescription Presentation.* The IRCs have developed and submitted the rates it believes were just and reasonable. That submission is based on the best available cost evidence and was presented through an expert witness, Harry Gildea, whose qualifications weren't questioned.[50] (Tr. Vol. 46).

95. A brief summary of how Gildea arrived at his proposal is appropriate at this point. Gildea started with Western Union Exhibit 15, the so-called "Blue Books." He used the last revisions to the Exhibit 15 data as the base for his calculations and adjustments. He used Exhibit 15 because that Exhibit shows the utility's revenues, investment, and expenses disaggregated between the usage, access, and station service elements.

96. *Gildea's Rate Base Adjustments.* Then, as a first step, Gildea made seven basic adjustments to that data in order to compute Western Union's maximum Telex and TWX revenue requirement for the 1978 to 1981 period. The seven adjustments may be summarized as follows:

(1) Gildea eliminated some of the overstated Digital Exchange System (DES) investment and expenses that wasn't used and useful in furnishing TWX/Telex service during the period (Findings paras. 43–44 *supra*);

(2) He removed certain investments and expenses for Public Message and Mailgram Services that had been improperly assigned to TWX/Telex;

(3) He broke out certain Infomaster expenses that weren't pertinent to Telex and TWX;

(4) He adjusted WU's Exhibit 15 results to reflect the *interstate* investment, expenses and revenues instead of the *interstate-intrastate totals* shown by Western Union (see Findings paras. 40–41 *supra*).

(5) He adjusted the TWX/Telex revenue requirements to reflect the actual income taxes Western Union owed its parent company instead of the hypothetical tax amount that WU had claimed (Tr. 5865, 5868; IRC Ex. 5, pp. 9–10; and Finding 45 *supra*);

(6) He eliminated all excess earnings *above* Western Union's 12.5% post-tax objective (see Footnote 49 *supra*); and

(7) He equalized pre-tax earnings ratios for the principal rate elements; i.e., usage, access, lines, and station equipment (see paras. 24–31, 36, and 49–58 *supra*).

These first step computations of Gildea are attached to this Decision as Appendix A. Those computations are adopted.[51] They represent *conservative* [52] but *appropriate* adjustments to Western Union's TWX/Telex rate base for the relevant period.

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[50] Gildea's submission was accepted in evidence (IRC Ex. No. 5).

[51] The Trial Staff believes that Gildea's adjustments to Western Union's 1978–1981 revenue requirements are fully warranted (see Tr. 6742; and T.S. Supplement PF's at para. 66).

[52] In their initial Findings both the IRCs and the Trial Staff pointed to several other

97. *Gildea's Rate Structure Adjustments*. Having developed his adjusted revenue requirement for the prescription period Gildea next turned his attention to the development of an appropriate rate structure for that period.

98. Western Union's own unadjusted data showed that the earnings for the three rate elements (usage, access, and station) were substantially out-of-balance (see e.g. Findings 49–57 *supra*). Gildea adjusted the data by developing appropriate revenue requirements for each service element. He did this by developing the correct ratio of the required revenues to the revenues actually received (see IRC Ex. 5, pp. 15–16). Then relying on the relative cost data developed by IRC witnesses, Figley, Jockers, and Van Slyke (see Findings paras. 79–80 *supra*)[53], Gildea developed ratios that would accurately portray the cost differences between the interstate domestic Telex/TWX services and the services provided to the IRCs. These procedures are adopted and summarized as Appendix B to this Phase 1 Decision.

99. At this juncture Gildea *checked* his calculations and adjustments against the Western Union studies that had been uncovered during the prescription discovery phase (see Findings paras. 41, 59–61, 82–84 and Footnotes 24, 25, 37 and 39). He concluded - and properly so - that Western Union's previously withheld data comported well with his own studies. Consequently he concluded that the relationship between international and domestic rates should reflect the relationship between the costs; that for ease of administration, the same relationship should exist for both Telex and TWX, inbound and outbound; and therefore that the international rates should be set at 75 percent of domestic rate levels.[54]

100. Gildea's proposed rate structure for the 1978–1981 period will be accepted (Findings paras. 97–99 *supra*). That rate structure is based on the best available cost evidence.[55] Gildea has analyzed and handled that evidence in a capable manner that comports with the record. In brief, his proposed rate structure is reasonable, fair and conservative (but see Footnote 54).

101. *Gildea's Proposed Rates*. Based on the data he had devel-

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deficiencies in Western Union's cost presentation. However, the additional mathematical adjustments could not be made because the quantitative data for this period hasn't been developed.

[53] This data showed that it cost Western Union about 23% less to handle inbound IRC traffic than to handle domestic traffic and 20% less to handle outbound IRC traffic.

[54] The Presiding Officer has accepted the 75% ratios with some hesitancy. Giving due regard to its formerly conservative approach (Finding para. 96 *supra*) but also considering Western Union's rebuttal efforts, a ratio of 80% is probably more-in-line with the overall record.

[55] If better cost evidence existed, both Western Union and the Separated Trial Staff had every opportunity to introduce it.

oped Gildea then calculated the cost-based rates that should have been in effect for the relevant time periods[56] by individual service element; i.e., for station equipment, for local access, for remote access, for Domestic usage, and for International usage. That 26 page rate schedule (attached as Appendix C) is adopted. The column captioned "Cost-Based Rate" is accepted as being the appropriate rate for the service element described on each page. Had those cost-based rates been in effect during the time periods described they would have been just and reasonable under 47 USC 201(b); they would have been non-discriminatory; and they would have given Western Union a fair and reasonable 12.5% rate of return on its TWX/Telex services.

102. However, Gildea went one step further than setting out what the legal rate should have been. In his analysis (Appendix C), he sets out the tariff rate which was in effect, the cost-based rate which has been adopted, and the extent of the overpayment or underpayment. Thus, the Appendix forms the basis of one of the IRCs' refund claims which will be discussed *infra*.[57]

Refunds

103. Western Union's 1978–1981 rate revisions have been declared illegal (Findings 47 and 94 *supra*). Legal rates for that same time period have been adopted (Finding 101 and Appendix C). We now turn to the IRCs' refund claims.[58]

104. *The IRCs' Proposals*. Essentially the IRCs plead in the alternative. First, they put in a refund claim based on the cost-based rates Gildea developed. The following Chart summarizes the amount of refund each IRC claims along with the accrued interest it claims at the Average Prime Rate-Compounded Monthly:

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[56] Gildea broke the rates down into monthly periods where appropriate.

[57] Page 1 of Appendix C shows the monthly rates for Telex Type 32 Station Equipment in the 1978–1981 time period. For each year except 1981, the cost-based rate was less than the effective rate. Page 2 shows the effective and cost-based rates for TWX Type 33 Station Equipment. For the TWX Station Equipment, the cost-based rates exceeded the effective rates. Pages 3–4 of Appendix C show the rates for the TWX and Telex local access element. Pages 5–6 show the TWX and Telex remote access component rates for the first mileage band. In every case, the actual charges for access fell short of the cost-based rates. Page 7–10 of Appendix C show usage charges for the public Telex service in the 1978–1981 period. Corresponding rates to the IRCs appear on pages 11–14. While cost-based rates for inbound and outbound service are the same, they need to be distinguished in some years because the effective rates were different. So the extent of overpayment or underpayment would be different for the two types of services. Pages 15–20 show the Public TWX rates for the period. Pages 21–26 show TWX rates for the IRCs.

[58] Of course a lot more is involved than just the IRCs' refund claims. But if a proper refund theory is adopted the Commission's accounting orders (see Footnote 8 *supra*) can be implemented.

CHART
IRC Cost-Based Refund Claim

Carrier	*Cost-Based Refund*	*Interest*	*Total Refund Claim*
ITT Worldcom	$25,842,071	$6,655,068	$32,497,139
RCA Globcom	21,500,000	5,360,106	26,860,106
WUI	20,343,103	5,552,091	25,895,194
TRT	6,312,939	1,572,938	7,885,877
FTCC	623,294	201,105	824,399
TOTAL	$74,621,407	$19,341,308	$93,962,715

105. Alternatively, the IRCs argue that if the Presiding Officer decides not to accept Gildea's cost-based rates then refunds (with interest) should nevertheless be ordered. And they contend that those refunds should be based on the differences in payments between the higher rates at issue here and the last preceding legal rate in effect either under tariff (the public rates) or pursuant to contracts (the IRC rates). This is the so-called "rollback refund" theory.

106. The following chart summarizes the amount of refund each IRC claims under rollback with the accrued interest it claims at the Average Prime Rate-Compounded Monthly:

CHART
IRC Rollback Refund Claim

Carrier	*Rolled Back Refund*	*Interest*	*Total Refund Claim*
ITT Worldcom	$8,608,534	$1,825,612*	$10,434,146
RCA Globcom	9,100,000	2,036,089	11,136,089
WUI	8,349,286	1,928,782*	10,278,068
TRT	2,565,746	570,548	3,136,294
FTCC	183,444	51,048	234,492
TOTAL	$28,807,010	$6,412,079	$35,219,089

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* It isn't clear why - if both parties calculated their accrued interest the same way - ITT would accrue $1.8 million in interest on an $8.6 million refund claim while WUI would accrue $1.9 million in interest on only an $8.3 million refund claim.

107. *The Trial Staff's Proposal.* The Separated Trial Staff agrees that the Western Union rate revisions for the period in question were unjust, unreasonable, and unlawfully discriminatory. It further agrees that refunds are entirely appropriate.

108. But it doesn't buy either the IRCs' cost-based or roll-back proposals. It claims that the IRCs calculated its cost-based refunds on a netting-out theory; i.e., the IRCs netted out rate increases and rate decreases. This would mean, says the Trial Staff, that the long-haul customer (who benefitted from Western Union's discriminatory step

usage structure) would presumably be expected to pay Western Union a negative refund. The Trial Staff *now* also opposes rollback refunds for the same reason.[59]

109. Moreover, the Trial Staff asserts, it wasn't really necessary for Gildea to make his earnings equalization adjustments to get specific rates (see Findings 97–102 *supra*), since such adjustments are only required when rates are to be prescribed for the future.

110. Instead the Trial Staff sets out its own refund theory. It would require Western Union to refund to each TWX or Telex customer an "equitable" percentage of its billings of the rates under investigation. And using 1979 Telex/TWX interstate revenue and revenue requirements the Staff establishes that "equitable" percentage at 16.2% for Telex 'and 7.5% for TWX. Under this "equitable refund proposal", says the Staff, "each customer [will] receive a refund of these percentages on all of its billings under the rates in issue."

111. Once the "equitable" refund has been calculated the Trial Staff recommends that interest for each year be added. In calculating the amount of interest due the Staff would use the rate of return percentage found reasonable for the period in issue; i.e., in this instance 12.5% from 1978–1980 and 13.8% in 1981 (see Footnote 49 and Para. 91(6) *supra*).

112. *Refund Discussion.* At the outset the Trial Staff's basic refund proposal[60] will be rejected. It must be rejected for any one of several reasons. The Trial Staff's "equitable" refund proposal would obviously benefit Western Union as opposed to the IRCs and other short-haul customers. But Western Union doesn't merit "equity". He who seeks equity must do so with clean hands. Here we have a carrier who deliberately devised and employed TWX/Telex rate schedules that *discriminated* against short-haul users. Moreover that Carrier, with its TWX/Telex market dominance, used the revenues obtained from that discriminatory TWX/Telex rate structure to cross-subsidize both its other regulated and its non-regulated services. That is not clean hands.

113. Secondly, contrary to the Trial Staff's assertions, Gildea's equalization adjustments are indeed necessary if we are to face up to the discriminatory usage rate structure Western Union used to enhance its TWX/Telex monopoly position. Gildea went through the complex effort it took to develop cost-based rates that complied with Docket 18128's cost guidelines. He met the Commission's applicable standards as nearly as practicable. He used the best available cost evidence and relied on proven ratemaking principles to effect his

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[59] Originally the Trial Staff supported rollback refunds. It didn't abandon them until the 1978–1981 prescription evidence was adduced. See TS Supp. PFs at Footnote 30.

[60] The Trial Staff's proposed interest rate calculation will be discussed *infra*.

structural adjustments. So contrary to the Trial Staff's assertions, if we are to remain faithful to Docket 18128's cost precepts, there is every reason to accept Gildea's earnings equalization adjustments.[61]

114. Third, and putting Gildea's cost-based rates aside momentarily, the Trial Staff's rate refund proposal would still have to be rejected. It simply isn't supported by the record. The Trial Staff was given every opportunity to present prescription evidence (which would, of course, include a refund proposal). It elected not to do so. Instead it chose not to expose its refund recommendation to either the crucible of cross examination or the scrutiny of the other parties until it filed its Supplemental Proposed Findings.[62] Consequently its belated recommendation has neither a legal or logical basis nor a thorough factual predicate.

115. The Staff argues that under either IRC refund proposal the long-haul customers who benefitted from WU's discriminatory mileage step rate structure would be exposed to a negative refund. This just isn't so. WU cannot and will not be permitted to employ an illegal rate schedule, and then when it's caught using that discriminatory schedule, cut its losses by proceeding against those unwary customers who received a windfall from those illegal rates. This isn't a situation where a Carrier has failed to collect a *legal* rate from or has inadvertently undercharged a given group of customers. There the Carrier is obligated to collect the tariff undercharge, not only to protect its own financial integrity, but to be certain that *all* of its customers pay their fair share. Here we're dealing with funds collected under an illegal rate structure.

116. Having rejected the Trial Staff's "equitable" refund proposal, we must next reject the IRCs' "rollback" claim (see Findings 105–106 *supra*). The "rollback" claim is basically flawed since the rate the IRCs would roll back to is in all probability also illegal. There is tangible record evidence that the last rate in effect prior to the 1978–1981 rate revisions was also unjust, and unreasonable, and discriminated against WU's short-haul users.

117. The IRCs recognize this. And they concede that "rollback" is "not ideal in terms of the statutory scheme of the Communications Act." But they contend that "rollback" is a necessary form of relief where the carrier has stonewalled in terms of supplying information which would make prescription feasible, or even possible.

118. The short answer to this contention is that the carrier -

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[61] Indeed, in Docket 20814 as well as in other recent rate cases, it has been the Trial Staff who spearheaded the battle for cost-based rates. Now, having finally gotten cost-based rates, the Trial Staff doesn't want them. It's strange.

[62] By resorting to "equity" it's almost as if the Trial Staff wants to exculpate Western Union at any cost. As the IRCs point out the Staff now - for the first time - seems willing to condone Western Union's gambit of avoiding cost-based pricing, shifting unjustified cost burdens to the usage category, and then disingenuously disavowing its State Separations Study results.

albeit belatedly and reluctantly - has supplied the information which permitted Gildea to "prescribe" the just, reasonable, and nondiscriminatory rates which should have been in effect during the relevant 1978–1981 time period.

119. This being so the IRC basic cost-based refund claim and the rates underlying that claim are adopted (see Findings 101–102 and 104 *supra*) and Western Union must pay refunds on that basis. This means that Western Union must refund $74,621,407 to the IRCs as a group, and must also make refunds to any other short-haul users whose rates during 1978–1981 should have been those set out in Appendix C.

120. Finally we must address the method of calculating the interest on the refunds that have been awarded. The Trial Staff believes that interest should be calculated by using the rate of return found reasonable for the period in issue "although admittedly there are arguments in favor of other procedures" (see Finding 111 *supra*; and Footnote 49 *supra*, and TS Supp. P.F. para. 71). The IRCs want interest calculated at the average prime rate-compounded monthly (see Finding 104 *supra*). In support they point out that since 1979 the Federal Energy Radio Commission (FERC) has used the prime rate in calculating refund interest and they cite 18 CFR 35.19(a).

121. The Trial Staff's basic approach to calculating interest will be adopted. Interest on the refunds will be calculated at 12 1/2% simple interest for the relevant period.[63] Calculating refund interest by using the rate of return for the period in issue has its advantages. It is high enough to discourage the carrier's management from implementing any further discriminatory rate schedules. Yet it would not impose the excessive burden the Trial Staff claims would result if the prime interest rate were used.

122. Before leaving the subject of refunds one further observation must be made. Like the Trial Staff (Footnotes 61 and 62 *supra*) the Presiding Officer is acutely sensitive to the magnitude of the refunds that Western Union will have to pay under the relevant accounting orders. The $74.6 million due the IRCs alone - even without interest - is an enormous amount.[64] But the immensity of the refunds cannot govern. The size of the refunds are immense because WU's illegal rate levels and its discriminatory rate structures were equally vast. But even more importantly, if the Commission's Docket 18128 cost guidelines are worthwhile; if we are sincerely concerned about cost-based rates for the public; if we are to

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[63] Since Dr. Matthews' 13.8% rate of return recommendation hasn't yet been adopted (see Footnote 49 *supra*) the 12 1/2% figure is appropriate for the entire 1978–1981 period that WU's rate revisions were in effect.

[64] This amount would undoubtely have been significantly less had there been no interim prescription. But that's water over the dam. See FCC 79M-845 released January 24, 1979; also see the Separate Trial Staff's Original Proposed Findings at paras. 11–12.

go beyond just paying lip-service to sound regulation; and if we are truthfully bound by the evidentiary record (and not our personal predilections) then there is no choice - the refunds ordered here are the appropriate relief.

Conclusions of Law

1. Between December 1, 1977 and May 1, 1981, Western Union filed three sets of rate revisions for its TWX/Telex services. When it was called upon to demonstrate the legality of those rate revisions, Western Union was unable to show that they were just and reasonable under 47 USC 201(b), and non-discriminatory under 47 USC 202(a).

2. In fact, the record evidence demonstrates that the converse is true. The TWX/Telex rates during this time period were unreasonably high. Moreover, in devising those rates, Western Union fashioned a rate structure schedule that discriminated against short-haul users in general and the International Record Carriers (IRCs) in particular.

3. The record further demonstrates that Western Union used the revenues obtained from that discriminatory rate structure schedule to cross-subsidize its other regulatory and non-regulatory services.

4. However, the IRCs - at the Presiding Officer's direction - have shown what the just and reasonable and non-discriminatory rates for the 1978–1981 time period should have been.[65] They have submitted cost-based rates that meet Docket 18128's guidelines; they have submitted rates that are based on the best available cost evidence and proven acceptable rate-making techniques; and they have submitted rates that would have alleviated the short-haul - long-haul discrimination.

5. Consequently, Western Union must, pursuant to those just, reasonable, non-discriminatory rates and pursuant to the Commission's accounting orders in this proceeding, refund monies to its TWX/Telex customers. Such refunds plus the accrued interest should be consistent with Findings paragraphs 112–122 of this Phase 1 Initial Decision.

So unless an appeal is taken from this Phase 1 Initial Decision or the Commission reviews it on its own motion under 47 CFR 1.276,[66] the TWX/Telex Revisions to Tariff FCC Nos. 240 and 258 filed with Transmittal No. 7346; Tariff FCC Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; and the TWX/Telex Revisions to Tariff FCC Nos. 229, 240, 254, 255, 258, 260, 263 and 268 filed with Transmittal No. 7417, ARE DECLARED unjust and unreasonable under 47 USC 201(b) and unduly discriminatory within the meaning of 47 USC 202(a);

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[65] The rates that the IRCs have presented would have provided Western Union with a fair rate of return of 12.5% on its TWX/Telex investment.

[66] Under Section 1.276, any exceptions must be filed within 30 days after the full text of this Phase 1 Initial Decision is publicly released. If no exceptions are filed and the Commission doesn't review the Decision within a 50-day period then the Initial Decision becomes effective. However, it must also be noted that there are also outstanding Phase 1 interlocutory pleadings before the Commission. E.g. see ITT Worldcom's May 22, 1981 Motion to Enlarge Issues and For Recission of Prior Interim Prescription; also see Footnote 5 of the Trial Staff's Supplemental Finding of Fact. This Initial Decision can't become effective until those

The TWX/Telex rates that the International Record Carriers have submitted (attached as Appendix C) for the relevant time period ARE DECLARED just and reasonable under 47 USC 201(b) and not unduly discriminatory within the meaning of 47 USC 202(a); and

The Western Union Telegraph Company MUST REFUND monies to its TWX/Telex customers (including the IRCs) in accordance with the relevant accounting orders and Findings paragraphs 112–122 of this Phase 1 Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

Interlocutories are disposed of. See 47 CFR 1.291(d).

APPENDIX A

GILDEA'S RATE ADJUSTMENTS

WESTERN UNION TELEGRAPH COMPANY

TELEX REVENUE REQUIREMENT - 1978

(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$246,242	$37,393	$52,760	$336,395
2. Less: DES	15,562			15,562
3. Less: PMS/MGM	6,008			6,008
4. Adjusted Total	$224,672	$37,393	$52,760	$314,825
5. Adjusted Interstate Net Investment Base	$199,396	$33,186	$46,825	$279,407
6. Return at 12.5%				$34,926
7. Income Taxes				4,066
8. Total				$38,992
9. Pre-tax Return Factor				13.96%
10. Equalized Pre-tax Return	$27,836	$4,633	$6,536	$39,005
11. Claimed Operating Revenue Deductions	$39,789	$24,820	$13,692	$78,301
12. Less: DES	2,633			2,633
13. Less: PMS/MGM	971			971
14. Less: Infomaster	29			29
15. Adjusted Total	$36,156	$24,820	$13,692	$74,668
16. Adjusted Interstate Operating Revenue Deductions	$32,052	$22,003	$12,138	$66,193
17. Interstate Revenue Requirement	$59,888	$26,636	$18,674	$105,198

WESTERN UNION TELEGRAPH COMPANY

TELEX REVENUE REQUIREMENT - 1979

(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$263,672	$41,198	$48,872	$353,742
2. Less: DES	36,159			36,159
3. Less: PMS/MGM	6,434			6,434
4. Adjusted Total	$221,079	$41,198	$48,872	$311,149
5. Adjusted Interstate Net Investment Base	$196,627	$36,642	$43,467	$276,736
6. Return at 12.5%				$34,592
7. Income Taxes				4,583
8. Total				$39,175
9. Pre-tax Return Factor				14.16%
10. Equalized Pre-tax Return	$27,842	$5,189	$6,154	$39,185
11. Claimed Operating Revenue Deductions	$47,797	$33,003	$12,958	$93,758
12. Less: DES	6,285			6,285
13. Less: PMS/MGM	1,166			1,166
14. Less: Infomaster	29			29
15. Adjusted Total	$40,317	$33,003	$12,958	$86,278
16. Adjusted Interstate Operating Revenue Deductions	$35,810	$29,313	$11,509	$76,632
Interstate Revenue Requirement	$63,652	$34,502	$17,663	$115,817

WESTERN UNION TELEGRAPH COMPANY

TELEX REVENUE REQUIREMENT - 1980
(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$278,796	$44,906	$44,952	$368,654
2. Less: DES	42,637			42,637
3. Less: PMS/MGM	6,803			6,803
4. Adjusted Total	$229,356	$44,906	$44,952	$319,214
5. Adjusted Interstate Net Investment Base	$203,990	$39,939	$39,980	$283,909
6. Return at 12.5%				$35,489
7. Income Taxes				7,042
8. Total				$42,531
9. Pre-tax Return Factor				14.98%
10. Equalized Pre-tax Return	$30,558	$5,983	$5,989	$42,530
11. Claimed Operating Revenue Deductions	$52,416	$32,670	$12,482	$97,568
12. Less: DES	7,574			7,574
13. Less: PMS/MGM	1,279			1,279
14. Less: Infomaster	28			28
15. Adjusted Total	$43,535	$32,670	$12,482	$88,687
16. Adjusted Interstate Operating Revenue Deductions	$38,668	$29,017	$11,087	$78,772
17. Interstate Revenue Requirement	$69,226	$35,000	$17,076	$121,302

WESTERN UNION TELEGRAPH COMPANY

TELEX REVENUE REQUIREMENT - 1981
(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$280,227	$48,302	$40,930	$369,459
2. Less: DES	46,224			46,224
3. Less: PMS/MGM	6,838			6,838
4. Adjusted Total	$227,165	$48,302	$40,930	$316,397
5. Adjusted Interstate Net Investment Base	$202,041	$42,960	$36,403	$281,404
6. Return at 12.5%				$35,176
7. Income Taxes				8,820
8. Total				$43,996
9. Pre-tax Return Factor				15.63%
10. Equalized Pre-tax Return	$31,579	$6,715	$5,689	$43,983
11. Claimed Operating Revenue Deductions	$54,808	$33,454	$12,008	$100,270
12. Less: DES	8,313			8,313
13. Less: PMS/MGM	1,337			1,337
14. Less: Infomaster	28			28
15. Adjusted Total	$45,130	$33,454	$12,008	$90,592
16. Adjusted Interstate Operating Revenue Deductions	$40,084	$29,714	$10,666	$80,464
17. Interstate Revenue Requirement	$71,663	$36,429	$16,355	$124,447

WESTERN UNION TELEGRAPH COMPANY

TWX REVENUE REQUIREMENT - 1978
(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$57,937	$4,693	$84,240	$146,870
2. Less: DES	18,642			18,642
3. Less: PMS/MGM	904			904
4. Adjusted Total	$38,391	$4,693	$84,240	$127,324
5. Adjusted Interstate Net Investment Base	$31,688	$3,874	$69,531	$105,093
6. Return at 12.5%				$13,137
7. Income Taxes				1,570
8. Total				$14,707
9. Pre-tax Return Factor				13.99%
10. Equalized Pre-tax Return	$4,433	$542	$9,727	$14,702
11. Claimed Operating Revenue Deductions	$39,809	$25,258	$29,515	$94,582
12. Less: DES	2,274			2,274
13. Less: PMS/MGM	621			621
14. Less: Infomaster	26			26
15. Adjusted Total	$36,888	$25,258	$29,515	$91,661
16. Adjusted Interstate Operating Revenue Deductions	$30,418	$20,828	$24,338	$75,584
17. Interstate Revenue Requirement	$34,851	$21,370	$34,065	$90,286

WESTERN UNION TELEGRAPH COMPANY

TWX REVENUE REQUIREMENT - 1979
(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$104,411	$8,066	$77,625	$190,102
2. Less: DES	30,874			30,874
3. Less: PMS/MGM	1,629			1,629
4. Adjusted Total	$71,908	$8,066	$77,625	$157,599
5. Adjusted Interstate Net Investment Base	$60,173	$6,750	$64,956	$131,879
6. Return at 12.5%				$16,485
7. Income Taxes				2,363
8. Total				$18,848
9. Pre-tax Return Factor				14.29%
10. Equalized Pre-tax Return	$8,599	$965	$9,282	$18,846
11. Claimed Operating Revenue Deductions	$42,787	$26,719	$27,624	$97,130
12. Less: DES	4,001			4,001
13. Less: PMS/MGM	667			667
14. Less: Infomaster	26			26
15. Adjusted Total	$38,093	$26,719	$27,624	$92,436
16. Adjusted Interstate Operating Revenue Deductions	$31,861	$22,348	$23,104	$77,313
17. Interstate Revenue Requirement	$40,460	$23,313	$32,386	$96,159

WESTERN UNION TELEGRAPH COMPANY

TWX REVENUE REQUIREMENT - 1980

(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$123,659	$11,357	$70,212	$205,228
2. Less: DES	29,051			29,051
3. Less: PMS/MGM	1,929			1,929
4. Adjusted Total	$ 92,679	$11,357	$70,212	$174,248
5. Adjusted Interstate Net Investment Base	$ 77,554	$ 9,504	$58,753	$145,811
6. Return at 12.5%				$ 18,226
7. Income Taxes				3,819
8. Total				$ 22,045
9. Pre-tax Return Factor				15.12%
10. Equalized Pre-tax Return	$11,726	$1,437	$8,883	$ 22,046
11. Claimed Operating Revenue Deductions	$ 40,500	$27,876	$26,836	$ 95,212
12. Less: DES	3,980			3,980
13. Less: PMS/MGM	632			632
14. Less: Infomaster	27			27
15. Adjusted Total	$ 35,861	$27,876	$26,836	$90,573
16. Adjusted Interstate Operating Revenue Deductions	$29,994	$23,315	$22,446	$75,755
17. Interstate Revenue Requirement	$41,720	$24,752	$31,329	$ 97,801

WESTERN UNION TELEGRAPH COMPANY

TWX REVENUE REQUIREMENT - 1981

(000)

	Usage	Access	Station	Total
1. Claimed Net Investment Base	$132,463	$15,796	$62,713	$210,972
2. Less: DES	25,778			25,778
3. Less: PMS/MGM	2,066			2,066
4. Adjusted Total	$104,619	$15,796	$62,713	$183,128
5. Adjusted Interstate Net Investment Base	$87,545	$13,218	$52,478	$153,241
6. Return at 12.5%				$19,155
7. Income Taxes				4,950
8. Total				$24,105
9. Pre-tax Return Factor				15.73%
10. Equalized Pre-tax Return	$13,771	$2,079	$8,255	$24,105
11. Claimed Operating Revenue Deductions	$33,117	$27,040	$25,492	$85,649
12. Less: DES	3,862			3,862
13. Less: PMS/MGM	517			517
14. Less: Infomaster	28			28
15. Adjusted Total	$28,710	$27,040	$25,492	$81,242
16. Adjusted Interstate Operating Revenue Deductions	$24,013	$22,616	$21,322	$67,951
17. Interstate Revenue Requirement	$37,784	$24,695	$29,577	$92,056

APPENDIX B

GILDEA'S ADJUSTMENT RATIOS

WESTERN UNION TELEGRAPH COMPANY

TELEX RATE ADJUSTMENT RATIOS

	Interstate Revenue Requirement (000)	*Total Revenue (000)*	*Interstate Revenue (000)*	*Interstate Rate Ratio*
1978				
Usage	$59,888	$83,252	$76,317	0.785
Access	26,636	24,368	22,338	1.192
Station	18,674	22,052	20,215	0.924
	$105,198	$129,672	$118,870	
1979				
Usage	$63,652	$99,966	$92,019	0.692
Access	34,502	29,517	27,170	1.270
Station	17,663	20,686	19,041	0.928
	$115,817	$150,169	$138,230	
1980				
Usage	$69,226	$113,687	$104,649	0.662
Access	35,000	31,453	28,952	1.209
Station	17,076	19,205	17,678	0.966
	$121,302	$164,345	$151,279	
1981				
Usage	$71,663	$122,464	$112,728	0.636
Access	36,429	33,513	30,849	1.181
Station	16,355	17,723	16,314	1.003
	$124,447	$173,700	$159,891	

WESTERN UNION TELEGRAPH COMPANY

TWX RATE ADJUSTMENT RATIOS

	Interstate Revenue Requirement (000)	*Total Revenue (000)*	*Interstate Revenue (000)*	*Interstate Rate Ratio (000)*
1978				
Usage	$34,851	$64,272	$55,756	0.625
Access	21,370	14,385	12,479	1.712
Station	34,065	33,583	29,133	1.169
	$90,286	$112,240	$97,368	
1979				
Usage	$40,460	$70,537	$60,958	0.664
Access	23,313	17,689	15,287	1.525
Station	32,386	32,051	27,699	1.169
	$96,159	$120,277	$103,944	
1980				
Usage	$41,720	$78,641	$67,692	0.614
Access	24,752	18,533	16,016	1.545
Station	31,329	30,463	26,326	1.190
	$97,801	$127,637	$110,304	

	Interstate Revenue Requirement (000)	*Total Revenue (000)*	*Interstate Revenue (000)*	*Interstate Rate Ratio (000)*
1981				
Usage	$37,784	$85,186	$73,618	0.513
Access	24,695	19,490	16,843	1.466
Station	29,577	28,869	24,949	1.185
	$92,056	$133,545	$115,410	

WESTERN UNION TELEGRAPH COMPANY

Ratios of International to Interstate Domestic Costs

Study	Data Year	Telex		TWX
IRC Witnesses	1976-1977	Inbound	0.768	
Figley, et al.	1976-1977	Outbound	0.803	
Western Union Studies (Appendix A)	1976-1977	Minutes of Use Step Minutes	0.702 0.775	
Western Union Separations Studies	1977	0.614		0.695
	1978	0.551		0.755
	1979	0.504		0.992

APPENDIX C

THE APPROPRIATE RATES FOR THE 1978-1981 TIME PERIOD AND THE BASIS FOR ONE OF THE IRCs REFUND CLAIMS

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TELEX TYPE 32 STATION EQUIPMENT

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978	$66.50	$61.50	$ 5.00
1979			
Jan. - Oct.	66.50	63.30	3.20
Nov. - Dec.	76.50		13.20
1980	76.50	73.90	2.60
1981	76.50	76.75	(0.25)

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TWX TYPE 33 STATION EQUIPMENT

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978	$62.00	$72.50	$(10.50)
1979			
Jan. - Oct.	62.00	74.50	(12.50)
Nov. - Dec.	72.00		(2.50)
1980	72.00	85.70	(13.70)
1981	72.00	85.35	(13.35)

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TELEX LOCAL ACCESS

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978			
Jan. - Sept.	$27.00	$33.10	$(6.10)
Oct. - Dec.	30.00		(3.10)
1979	30.00	38.10	(8.10)
1980	30.00	36.30	(6.30)
1981			
Jan. - Mar.	30.00		
April -			
A Terminals	30.00	35.45	(5.45)
B Terminals	35.00	41.35	(6.35)
C Terminals	40.00	47.25	(7.25)

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TWX LOCAL ACCESS

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978	$16.50	$28.30	$(11.80)
1979	16.50	25.20	(8.70)
1980	16.50	25.50	(9.00)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1981			
Jan. - Mar.	16.50		
April -			
A Terminals	30.00	44.00	(14.00)
B Terminals	35.00	51.35	(16.35)
C Terminals	40.00	58.65	(18.65)

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TELEX REMOTE ACCESS
(First Mileage Band)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978			
Jan. - Sept.	$1.47	$1.80	$(0.33)
Oct. - Dec.	1.50		(0.30)
1979	1.50	2.00	(0.50)
1980	1.50	1.90	(0.40)
1981			
Jan. - Mar.	1.50		(2.65)
April - May	3.00	4.15	(1.15)
June - Dec.	3.50		(0.65)

WESTERN UNION TELEGRAPH COMPANY

MONTHLY RATES FOR TWX REMOTE ACCESS
(First Mileage Band)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
1978			
Jan. - Feb.	$0.50		$(1.10)
Mar. - Sept.	0.75	$1.60	(0.85)
Oct. - Dec.	1.50		(0.10)
1979	1.50	2.30	(0.80)
1980	1.50	2.40	(0.90)
1981			
Jan. - Mar.	1.50		(3.65)
April - May	3.00	5.15	(2.15)
June - Dec.	3.50		(1.65)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TELEX USAGE - 1978
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
Jan. - July			
Band A	17.5¢	15.9¢	1.6¢
Band B	30.0	27.3	2.7

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band C	45.0	40.9	4.1
Band D	60.0	54.5	5.5
Aug. - Sep.			
Band A	22.5	15.9	6.6
Band B	37.5	27.3	10.2
Band C	37.5	40.9	(3.4)
Band D	52.5	54.5	(2.0)
Oct. - Dec.			
Band A	22.5	15.9	6.6
Band B	45.0	27.3	17.7
Band C	45.0	40.9	4.1
Band D	52.5	54.5	(2.0)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TELEX USAGE - 1979
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band A	22.5¢	16.7¢	5.8¢
Band B	45.0	28.6	16.4
Band C	45.0	42.9	2.1
Band D	52.5	57.3	(4.8)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TELEX USAGE - 1980
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band A	22.5¢	17.4¢	5.1¢
Band B	45.0	29.8	15.2
Band C	45.0	44.7	0.3
Band D	52.5	59.7	(7.2)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TELEX USAGE – JANUARY-APRIL 1981
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
Jan. - Mar.			
Band A	22.5¢	16.7¢	5.8¢
Band B	45.0	28.6	16.4
Band C	45.0	43.0	2.0
Band D	52.5	57.4	(4.9)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TELEX USAGE - 1978

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
Jan. - July						
Band A	16.5¢	11.9¢	4.6¢	16.5¢	11.9¢	4.6¢
Band B	28.4	20.5	7.9	28.4	20.5	7.9
Band C	42.5	30.7	11.8	42.5	30.7	11.8
Band D	56.7	40.9	15.8	56.7	40.9	15.8
Aug. - Sept.						
Band A	22.5	11.9	10.6	16.5	11.9	4.6
Band B	37.5	20.5	17.0	28.4	20.5	7.9
Band C	37.5	30.7	6.8	42.5	30.7	11.8
Band D	52.5	40.9	11.6	56.7	40.9	15.8
Oct. - Dec.						
Band A	22.5	11.9	10.6	16.5	11.9	4.6
Band B	45.0	20.5	24.5	28.4	20.5	7.9
Band C	45.0	30.7	14.3	42.5	30.7	11.8
Band D	52.5	40.9	11.6	56.7	40.9	15.8

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TELEX USAGE - 1979

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
Jan. - July						
Band A	22.5¢	12.5¢	10.0¢	16.5¢	12.5¢	4.0¢
Band B	45.0	21.5	23.5	28.4	21.5	6.9
Band C	45.0	32.2	12.8	42.5	32.2	10.3
Band D	52.5	43.0	9.5	56.7	43.0	13.7
Aug. - Dec.						
Band A	22.5	12.5	10.0	22.5	12.5	10.0
Band B	45.0	21.5	23.5	45.0	21.5	23.5
Band C	45.0	32.2	12.8	45.0	32.2	12.8
Band D	52.5	43.0	9.5	52.5	43.0	9.5

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TELEX USAGE - 1980

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band A	22.5¢	13.1¢	9.4¢	22.5¢	13.1¢	9.4¢
Band B	45.0	22.4	22.6	45.0	22.4	22.6

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band C	**45.0**	**33.5**	**11.5**	**45.0**	**33.5**	**11.5**
Band D	**52.5**	**44.8**	**7.7**	**52.5**	**44.8**	**7.7**

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TELEX USAGE - JANUARY-APRIL 1981

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
Band A	**22.5¢**	**12.6¢**	**9.9¢**	**22.5¢**	**12.6¢**	**9.9¢**
Band B	**45.0**	**21.5**	**23.5**	**45.0**	**21.5**	**23.5**
Band C	**45.0**	**32.3**	**12.7**	**45.0**	**32.3**	**12.7**
Band D	**52.5**	**43.1**	**9.4**	**52.5**	**43.1**	**9.4**

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE—JANUARY-JULY 1978

(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	**20.0¢**	**13.5¢**	**6.5¢**
41- 50	**20.0**	**13.5**	**6.5**
51- 110	**25.0**	**17.0**	**8.0**
111- 124	**30.0**	**20.4**	**9.6**
125- 185	**30.0**	**20.4**	**9.6**
186- 280	**35.0**	**23.7**	**11.3**
281- 355	**40.0**	**27.1**	**12.9**
356- 400	**40.0**	**27.1**	**12.9**
401- 550	**45.0**	**30.5**	**14.5**
551- 750	**50.0**	**33.9**	**16.1**
751-1024	**55.0**	**37.3**	**17.7**
1024-1030	**55.0**	**37.3**	**17.7**
1031-1430	**60.0**	**40.6**	**19.4**
1431-2000	**65.0**	**44.1**	**20.9**
More than 2000	**70.0**	**47.3**	**22.7**

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE—AUGUST-DECEMBER 1978

(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	**30.0¢**	**13.5¢**	**16.5¢**
41- 50	**40.0**	**13.5**	**26.5**
51- 110	**40.0**	**17.0**	**23.0**
111- 124	**40.0**	**20.4**	**19.6**

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
125- 185	44.0	20.4	23.6
186- 280	44.0	23.7	20.3
281- 355	44.0	27.1	16.9
356- 400	48.0	27.1	20.9
401- 550	48.0	30.5	17.5
551- 750	48.0	33.9	14.1
751-1024	48.0	37.3	10.7
1025-1030	52.0	37.3	14.7
1031-1430	52.0	40.6	11.5
1431-2000	52.0	44.1	7.9
More than 2000	52.0	47.3	4.7

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE — JANUARY-JULY 1979

(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	15.0¢	15.0¢
41- 50	40.0	15.0	25.0
51- 110	40.0	18.8	21.2
111- 124	40.0	22.5	17.5
125- 185	44.0	22.5	21.5
186- 280	44.0	26.1	17.9
281- 355	44.0	29.9	14.1
356- 400	48.0	29.9	18.1
401- 550	48.0	33.6	14.4
551- 750	48.0	37.5	10.5
751-1024	48.0	41.3	6.7
1025-1030	52.0	41.3	10.7
1031-1430	52.0	44.9	7.1
1431-2000	52.0	48.9	3.1
More than 2000	52.0	52.2	(0.2)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE - AUGUST-DECEMBER 1979

(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	15.0¢	15.0¢
41- 50	40.0	15.0	25.0
51– 110	40.0	18.8	21.2
111– 124	40.0	22.5	17.5
125– 185	44.0	22.5	21.5
186– 280	44.0	26.1	17.9
281– 355	44.0	29.9	14.1
356– 400	48.0	29.9	18.1
401– 550	48.0	33.6	14.4
551– 750	48.0	37.5	10.5

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
751–1024	48.0	41.3	6.7
1025–1030	52.0	41.3	10.7
1031–1430	52.0	44.9	7.1
1431–2000	52.0	48.9	3.1
More than 2000	52.0	52.2	(0.2)

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE - 1980
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	14.9¢	15.1¢
41- 50	40.0	14.9	25.1
51- 110	40.0	18.7	21.3
111- 124	40.0	22.5	17.5
125- 185	44.0	22.5	21.5
186- 280	44.0	26.1	17.9
281- 355	44.0	29.9	14.1
356- 400	48.0	29.9	18.1
401- 550	48.0	33.6	14.4
551- 750	48.0	37.5	10.5
751-1024	48.0	41.3	6.7
1025-1030	52.0	41.3	10.7
1031-1430	52.0	44.8	7.2
1431-2000	52.0	48.7	3.3
More than 2000	52.0	52.0	0.0

WESTERN UNION TELEGRAPH COMPANY

RATES FOR DOMESTIC TWX USAGE – JANUARY-APRIL 1981
(per minute)

	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	12.5¢	17.5¢
41- 50	40.0	12.5	27.5
51- 110	40.0	15.6	24.4
111- 124	40.0	18.8	21.2
125- 185	44.0	18.8	25.2
186- 280	44.0	21.8	22.2
281- 355	44.0	25.0	19.0
356- 400	48.0	25.0	23.0
401- 550	48.0	28.1	19.9
551- 750	48.0	31.4	16.6
751-1024	48.0	34.5	13.5
1025-1030	52.0	34.5	17.5
1031-1430	52.0	37.5	14.5
1431-2000	52.0	40.7	11.3
More than 2000	52.0	43.5	8.5

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE – JANUARY-JULY 1978
(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	18.9¢	10.1¢	8.8¢	18.9¢	10.1¢	8.8¢
41- 55	18.9	10.1	8.8	18.9	10.1	8.8
51- 110	23.6	12.8	10.8	23.6	12.8	10.8
111- 124	28.3	15.3	13.0	28.3	15.3	13.0
125- 185	28.3	15.3	13.0	28.3	15.3	13.0
186- 280	33.1	17.8	15.3	33.1	17.8	15.3
281- 355	37.8	20.3	17.5	37.8	20.3	17.5
356- 400	37.8	20.3	17.5	37.8	20.3	17.5
401- 550	42.5	22.9	19.6	42.5	22.9	19.6
551- 750	47.2	25.4	21.8	47.2	25.4	21.8
751-1024	52.0	28.0	24.0	52.0	28.0	24.0
1025-1030	52.0	28.0	24.0	52.0	28.0	24.0
1031-1430	56.7	30.5	26.2	56.7	30.5	26.2
1431-2000	61.4	33.1	28.3	61.4	33.1	28.3
More than 2000	66.1	35.5	30.6	66.1	35.5	30.6

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE—AUGUST-DECEMBER 1978
(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	10.1¢	19.9¢	18.9¢	10.1¢	8.8¢
41- 50	40.0	10.1	29.9	18.9	10.1	8.8
51- 110	40.0	12.8	27.2	23.6	12.8	10.8
111- 124	40.0	15.3	24.7	28.3	15.3	13.0
125- 185	44.0	15.3	28.7	28.3	15.3	13.0
186- 280	44.0	17.8	26.2	33.1	17.8	15.3
281- 355	44.0	20.3	23.7	37.8	20.3	17.5
356- 400	48.0	20.3	27.7	37.8	20.3	17.5
401- 550	48.0	22.9	25.1	42.5	22.9	19.6
551- 750	48.0	25.4	22.6	47.2	25.4	21.8
751-1024	48.0	28.0	20.0	52.0	28.0	24.0
1025-1030	52.0	28.0	24.0	52.0	28.0	24.0
1031-1430	52.0	30.5	21.5	56.7	30.5	26.2
1431-2000	52.0	33.1	18.9	61.4	33.1	28.3
More than 2000	52.0	35.5	16.5	66.1	35.5	30.6

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE – JANUARY-JULY 1979

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	11.3¢	18.7¢	18.9¢	11.3¢	7.6¢
41- 50	40.0	11.3	28.7	18.9	11.3	7.6
51- 110	40.0	14.1	25.9	23.6	14.1	9.5
110- 124	40.0	16.9	23.1	28.3	16.9	11.4
125- 185	44.0	16.9	27.1	28.3	16.9	11.4
186- 280	44.0	19.6	24.4	33.1	19.6	13.5
281- 355	44.0	22.4	21.6	37.8	22.4	15.4
356- 400	48.0	22.4	25.6	37.8	22.4	15.4
401- 550	48.0	25.2	22.8	42.5	25.2	17.3
551- 750	48.0	28.1	19.9	47.2	28.1	19.1
751-1024	48.0	31.0	17.0	52.0	31.0	21.0
1025-1030	52.0	31.0	21.0	52.0	31.0	21.0
1031-1430	52.0	33.7	18.3	56.7	33.7	23.0
1431-2000	52.0	36.7	15.3	61.4	36.7	24.7
More than 2000	52.0	39.2	12.8	66.1	39.2	26.9

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE—AUGUST-DECEMBER 1979

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	11.3¢	18.7¢	30.0¢	11.3¢	18.7¢
41- 50	40.0	11.3	28.7	40.0	11.3	28.7
51- 110	40.0	14.1	25.9	40.0	14.1	25.9
111- 124	40.0	16.9	23.1	40.0	16.9	23.1
125- 185	44.0	16.9	27.1	44.0	16.9	27.1
186- 280	44.0	19.6	24.4	44.0	19.6	24.4
281- 355	44.0	22.4	21.6	44.0	22.4	21.6
356- 400	48.0	22.4	25.6	48.0	22.4	25.6
401- 550	48.0	25.2	22.8	48.0	25.2	22.8
551- 750	48.0	28.1	19.9	48.0	28.1	19.9
751-1024	48.0	31.0	17.0	48.0	31.0	17.0
1025-1030	52.0	31.0	21.0	52.0	31.0	21.0
1031-1430	52.0	33.7	18.3	52.0	33.7	18.3
1431-2000	52.0	36.7	15.3	52.0	36.7	15.3
More than 2000	52.0	39.2	12.8	52.0	39.2	12.8

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE-1980

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	11.2¢	18.8¢	30.0¢	11.2¢	18.8¢
41- 50	40.0	11.2	28.8	40.0	11.2	28.8
51- 110	40.0	14.0	26.0	40.0	14.0	26.0
111- 124	40.0	16.9	23.1	40.0	16.9	23.1
125- 185	44.0	16.9	27.1	44.0	16.9	27.1
186- 280	44.0	19.6	24.4	44.0	19.6	24.4
281- 355	44.0	22.4	21.6	44.0	22.4	21.6
356- 400	48.0	22.4	25.6	48.0	22.4	25.6
401- 550	48.0	25.2	22.8	48.0	25.2	22.8
551- 750	48.0	28.1	19.9	48.0	28.1	19.9
751-1024	48.0	31.0	17.0	48.0	31.0	17.0
1025-1030	52.0	31.0	21.0	52.0	31.0	21.0
1031-1430	52.0	33.6	18.4	52.0	33.6	18.4
1431-2000	52.0	36.5	15.5	52.0	36.5	15.5
More than 2000	52.0	39.0	13.0	52.0	39.0	13.0

WESTERN UNION TELEGRAPH COMPANY

RATES FOR INTERNATIONAL TWX USAGE—JANUARY-APRIL 1981

(per minute)

	Inbound			*Outbound*		
	Effective Rate	*Cost-Based Rate*	*Overpayment (Underpayment)*	*Effective Rate*	*Cost-Based Rate*	*Overpayment (Underpayment)*
0- 40 miles	30.0¢	9.4¢	20.6¢	30.0¢	9.4¢	20.6¢
41- 50	40.0	9.4	30.6	40.0	9.4	30.6
51- 110	40.0	11.7	28.3	40.0	11.7	28.3
111- 124	40.0	14.1	25.9	40.0	14.1	25.9
125- 185	44.0	14.1	29.9	44.0	14.1	29.9
186- 280	44.0	16.4	27.6	44.0	16.4	27.6
281- 355	44.0	18.8	25.2	44.0	18.8	25.2
356- 400	48.0	18.8	29.2	48.0	18.8	29.2
401- 550	48.0	21.1	26.9	48.0	21.1	26.9
551- 750	48.0	23.6	24.4	48.0	23.6	24.4
751-1024	48.0	25.9	22.1	48.0	25.9	22.1
1025-1030	52.0	25.9	26.1	52.0	25.9	26.1
1031-1430	52.0	28.1	23.9	52.0	38.1	23.9
1431-2000	52.0	30.5	21.5	52.0	30.5	21.5
More than 2000	52.0	32.6	19.4	52.0	32.6	19.4

AM Station
Comparative Issue, Substantial, Moderate, Slight
Renewal, Applicant v. New Applicant

> In AM radio comparative renewal proceeding, incumbent preferred on comparative grounds. Incumbent received slight advantage for best practicable service; moderate integration advantage; and substantial preference under diversification of control.
> –*WIOO, Inc.*
> Docket No. 21506

FCC 83–367

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WIOO, INC. Carlisle, Pennsylvania	Docket No. 21506 File No. BR-4546
For Renewal of License	
Gerald M. Fried, Theodore A. Fried, James P. O'Leary and Arthur M. Sherman d/b/a	
CARLISLE BROADCASTING ASSOCIATES Carlisle, Pennsylvania	Docket NO. 21507 File No. BP-19,978
For Construction Permit	

Appearances

Samuel Miller, *Jerrold Miller*, and *Mark E. Fields* on behalf of WIOO, Inc.; *Michael W. Faber*, *Lewis A. Rivlin*, and *Nancy M. Stiles* on behalf of Carlisle Broadcasting Associates; and *Charles W. Kelley*, *Charles E. Dziedzic*, *William D. Silva*, *David Silberman*, *Kathleen Ann Phipps*, and *Lunell Anderson* on behalf of the Chief, Broadcast Bureau,[1] Federal Communications Commission.

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[1] Now Mass Media Bureau.

DECISION

(Adopted: July 28, 1983; Released: September 16, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

I. *INTRODUCTION*

1. WIOO, Inc. (WIOO) seeks renewal of its license to operate station WIOO, Carlisle, Pennsylvania. Carlisle Broadcasting Associates (CBA) has filed a mutually exclusive application for a construction permit seeking the same facilities. By Memorandum Opinion and Order, released January 3, 1978,[2] we designated the applications for hearing, specifying the standard comparative issue and an issue to determine the effect of misconduct found in a prior proceeding on WIOO's qualifications to remain a Commission licensee. Subsequently, the Presiding Judge (ALJ) added issues to determine whether WIOO had conducted its community leader survey in accordance with Commission requirements and whether WIOO misrepresented facts concerning the survey to the Commission.[3] The ALJ also added an issue against CBA to determine whether CBA improperly prepared and executed amendments to its application.[4]

2. In an Initial Decision, Chief Administrative Law Judge Lenore G. Ehrig granted WIOO's application and denied CBA's.[5] The ALJ found that in a prior comparative proceeding in which WIOO sought a construction permit for a new FM station, WIOO had submitted false jurats and abused the Commission's processes by engaging in impermissible "investigatory" tactics in an attempt to obstruct it its competitor's application.[6] In the ALJ's view, this misconduct warranted a comparative demerit against WIOO in the instant AM proceeding. The ALJ assessed a further slight demerit against WIOO based on her finding that WIOO's principal had failed to supervise adequately WIOO's community leader survey in connection with WIOO's AM renewal application. However, the ALJ concluded that these disadvantages were outweighed by WIOO's substantial preference over CBA for superior integration of ownership into management and by the fact that the record contained no evidence derogating WIOO's past programming efforts and technical operation. The ALJ also noted that CBA deserved a significant demerit for its principal's careless and inattentive behavior in filing amendments to its application.

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[2] *WIOO, Inc.*, 67 FCC 2d 444 (1978).

[3] FCC 78M-383, released March 14, 1978.

[4] FCC 78M-384, released March 14, 1978.

[5] FCC 79D-28, released July 9, 1979 (hereinafter ID).

[6] The ALJ was bound by the factual findings made by the Review Board in the prior FM proceeding under the doctrine of collateral estoppel. *See* para. 12 *infra*.

3. We have considered the findings and conclusions of the Initial Decision in light of the parties' Exceptions and arguments[7] and our examination of the record, and those findings and conclusions are adopted except as modified by this Decision. We have concluded that the Initial Decision should be affirmed, the application of WIOO should be granted, and that of CBA denied. We will also dispose of several interlocutory matters.

II. *INTERLOCUTORY MATTERS*

A. *PETITION TO ENLARGE ISSUES*

4. On June 28, 1982, following the close of the record, WIOO petitioned to enlarge the issues against CBA and to reopen the record.[8] Noting that the record indicates that neither applicant owns outside media interests,[9] WIOO charges that CBA's principals have since acquired such interests. WIOO further charges that these interests were not reported as required by Section 1.65 of the Commission's Rules.[10]

5. WIOO alleges that CBA's 30% partner James P. O'Leary and its 10% partner Arthur Sherman each have a 50% interest in Laurel Broadcasting Company, which acquired station WISL, Shamokin, Pennsylvania prior to February 1, 1982. According to WIOO, O'Leary is also a 20% owner of Quaker State Broadcasting Corporation, which acquired station WQVE-FM, Mechanicsburg, Pennsylvania on June 15, 1982. WIOO contends that CBA did not report the acquisition of WISL or the pendency of the application to acquire WQVE-FM. Thus, WIOO argues that the record must be reopened to reconsider the diversification comparison between WIOO and CBA and to consider whether CBA's violation of Section 1.65 of the Rules requires CBA's disqualification or a comparative demerit.[11] In this regard, WIOO stresses that the unreported information might be crucial to the comparative consideration of the applicants.

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[7] CBA and the Bureau filed Exceptions on August 8, 1979, and WIOO filed a Brief in Support of the Initial Decision and Limited Exceptions a day late on August 9. Good cause having been shown, we will grant WIOO's petition to accept its late filed pleading. The parties filed replies on August 29. As a letter filed December 4, 1979, by CBA urging expedited action is moot, we will dismiss it and a motion to strike the letter, filed December 12, 1979, by WIOO. The Commission heard oral argument on July 21, 1982.

[8] WIOO filed its Petition to Enlarge Issues and for Further Hearing on June 28, 1982. CBA and the Bureau filed an Opposition and Comments, respectively, on July 19, at which time CBA also filed a related Petition for Leave to Amend. WIOO filed a Reply on July 28.

[9] ID at Concls. para. 17.

[10] Section 1.65 of the Commission's Rules requires an applicant to report within 30 days any matter necessary to keep the application substantially accurate and complete in all significant respects and any matter which may be of decisional significance.

[11] WIOO also accuses CBA of failing to report a change in O'Leary's residence but does not assert that this is of decisional significance.

6. CBA acknowledges the acquisition of the two stations by its principals. However, CBA faults WIOO for raising these matters only three weeks before oral argument was to be held. In view of the lateness of WIOO's petition, CBA contends that a reopening of the record is unwarranted. CBA observes that, while it did not report the consummation of the transaction involving WISL, it did report the pendency of the application for assignment of that station. CBA further maintains that it had no prior obligation to report the acquisition of WQVE-FM and tenders a petition for leave to amend reflecting the acquisition.[12] CBA attributes failure to report the final acquisition of WISL and the pendency of the WQVE acquisition to a breakdown in communications with counsel. CBA suggests that the Commission could take official notice of the matters raised by WIOO.

7. The Bureau asserts that, as CBA did report the pendency of the application to acquire WISL, the Commission could not have been misled by the subsequent grant of the application. However, the Bureau believes that a comparative Section 1.65 issue would be warranted.

8. WIOO's Petition will be denied. CBA's voluntary reporting of the pendency of the WISL application amply rebuts any inference that CBA intended to conceal its acquisitions. In the absence of any indication that CBA intended to deceive the Commission, CBA's reporting failures would justify at most a comparative demerit.[13] On the facts before us, this demerit would be too slight to affect materially the comparative evaluation of the applicants under the character issue. The facts alleged here by WIOO and addressed by CBA do not suggest any significant misconduct by a principal of the applicant. Additionally, we need not enlarge the issues to take into account CBA's newly acquired interests under the diversification issue. We may take official notice of these undisputed facts. The record will be reopened for this purpose.

B. *PETITION TO REOPEN THE RECORD*

9. Following oral argument, WIOO petitioned to reopen the record to introduce evidence of its past broadcast service.[14] WIOO explains that it did not previously seek to introduce such evidence because it believed that Commission precedent permitted the

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[12] We will grant this petition to bring the record up to date.

[13] *See Southern Broadcasting Co.*, 57 FCC 2d 891 (1976); *Gross Broadcasting Co.*, 41 FCC 2d 729 (1973); *Lake Erie Broadcasting Co.*, 43 FCC 2d 886 (Rev. Bd. 1973).

[14] WIOO filed its Petition to Reopen the Record for Past Broadcast Record Testimony on August 10, 1982. CBA and the Bureau filed Oppositions on August 23 and August 25, respectively. WIOO filed a Reply and an accompanying contingent Motion for Leave to File on August 27. As WIOO'S Reply is acceptable for filing without special leave, we will dismiss the contingent motion as moot.

introduction of evidence only as to unusually good (superior) or unusually bad broadcast records.[15] According to WIOO, the Commission changed this policy for comparative renewal proceedings in *Cowles Broadcasting, Inc.*,[16] which permitted the incumbent to demonstrate that it had rendered substantial although not superior service.[17] WIOO urges that in fairness it must be given the opportunity to introduce evidence of its past record under the new standard. WIOO denies that it seeks to delay these proceedings. In conjunction with its Petition, WIOO submits copies of letters and awards received by WIOO and a description of its programming taken from its 1972 renewal and 1975 supplemental renewal applications. WIOO asserts that the Commission can expeditiously consider this evidence.

10. CBA and the Bureau characterize WIOO's Petition as grossly untimely. They assert that WIOO could have introduced evidence of its past broadcast record long ago at the hearing of these proceedings. In this regard, they also assert that WIOO misconstrues the law which governed the relevance of an incumbent's past broadcast record in comparative renewal cases prior to the recent *Cowles* Decision. They submit that only in new license proceedings was evidence of past broadcast record limited by the 1965 *Policy Statement* to unusually good or unusually bad records; in comparative renewal proceedings, the incumbent always runs on its record. They further observe that WIOO did not diligently attempt to introduce its evidence even after the *Cowles* Decision, but waited instead until after oral argument before the Commission. In any event, they consider the evidence attached by WIOO to its Petition unimpressive.

11. We will deny WIOO's Petition. Commission policy has always emphasized the materiality of an incumbent's past record in a comparative renewal proceeding. As we stated in our 1977 Report and Order on this subject:

> . . . The incumbent licensee's past performance achieved under the pressures and demands of day-to-day operation in the community, affords the Commission the strongest and most reasonable basis on which to determine whether the public interest will be served by its renewal. Our past practice in this regard has been to examine all elements of the licensee's past performance that bear upon its service in the public interest

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[15] WIOO relies on *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) (hereinafter 1965 *Policy Statement*), which applies to initial licensing proceedings.

[16] 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC,* 683 F.2d 503 (D.C. Cir. 1982), *reh. denied* October 15, 1982, *cert. denied,* 103 S. Ct. 1774 (1983).

[17] WIOO notes that the Commission stated: "In reaching this conclusion—that a preference may be awarded on the basis of a meritorious past record—we have articulated a new policy for comparative renewals." 86 FCC 2d at 996. *But see* para. 11 *infra.*

> . . [T]he renewal applicant must continue to run on its record, and we believe that the record should be measured by the degree to which the licensee's performance was sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal.[18]

Thus, while the recent *Cowles* Decision established new policy to the extent of specifying how a past broadcast record will be weighed against other factors, it merely extended our long established practice of considering the incumbent's past broadcast record relevant in comparative renewal proceedings. WIOO's effort to justify its belated proffer of evidence on the basis of changed policy must therefore fail. Use of a petition to reopen the record to bolster a defective evidentiary showing in light of adverse findings has been condemned on numerous occasions.[19] Moreover, although WIOO submits some evidence concerning its past record, this evidence cannot without further exploration of its significance at hearing be considered the kind of showing provided in *Cowles*, upon which weight could be placed in evaluating a licensee's past performance.[20]

II. *ISSUES CONCERNING WIOO*

A. *FM MISCONDUCT ISSUE*

12. In the prior FM proceeding (Docket No. 19468), WIOO and a competing mutually exclusive applicant Cumberland Broadcasting Company (Cumberland), sought a new FM station in Carlisle. The Review Board concluded that WIOO's misconduct in the FM proceeding rendered WIOO unqualified to be the FM licensee.[21] The misconduct in question occurred in 1972–73 after WIOO's 1972 renewal application had been filed and placed in deferred status pending the outcome of the FM proceeding.[22] Pursuant to the doctrine of collateral estoppel,[23] the ALJ here adopted the following

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[18] *Broadcast Renewal Applicant*, 66 FCC 2d 419, 429–30 (1977), *aff'd sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978). *See also Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971); *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966).

[19] *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 116 (1981), and cases cited therein. WIOO inferred that the Commission was concerned about the absence of past programming evidence from comments made by individual Commissioners during the oral argument. Petition to Reopen the Record for Past Broadcast Record Testimony at 4.

[20] In *Cowles* the Commission considered the significance of that applicant's percentage of non-entertainment programming, specific programs, and community reputation.

[21] *WIOO, Inc.*, 54 FCC 2d 692 (Rev. Bd.), *modified*, 56 FCC 2d 817 (Rev. Bd. 1975), *rev. denied*, FCC 76–892, released September 28, 1976.

[22] WIOO was required to file a supplemental renewal application in 1975, at which time CBA filed its competing application. *See Carlisle Broadcasting Associates*, 59 FCC 2d 885 (1976).

[23] In designating this AM proceeding for hearing, the Commission originally stated that the facts found in the FM proceeding would be *res judicata*. *WIOO, Inc.*,

findings of fact made by the Review Board concerning WIOO's submission of false jurats and improper investigatory tactics, which were found disqualifying in the FM proceeding.[24]

13. WIOO's 50% owner, Harold Swidler, submitted to the Commission six documents purporting to be affidavits, that were not in fact properly signed and sworn to by the affiants before a notary public. Swidler obtained unsworn statements regarding property which its FM competitor Cumberland intended to sell to meet its financial requirements and later, without the "affiants" knowledge, had the statements notarized. Swidler submitted the statements with the false jurats to the Commission in an attempt to secure the addition of issues against Cumberland. In one instance Swidler submitted a false jurat after an issue had already been added in the proceeding. The Review Board held that Swidler "knowingly violated the Commission's Rules in the belief that the end justified the means, an attitude which is totally unacceptable for a Commission licensee."[25]

14. Additionally, the Board found that on several occasions WIOO used impermissible tactics in "investigating" Cumberland and thereby abused the Commission's processes. Swidler's attempt to undermine Cumberland's ability to obtain its proposed transmitter site—by attempting to buy the land himself and by attempting to induce the landowner not to sell it to Cumberland, even after viewing Cumberland's valid option on the land—was found by the Board to be an act of obstruction justifying disqualification. The Board also found other objectionable tactics that involved Cumberland's attempts to sell or mortgage certain property to meet its financial requirements. Swidler attempted to intimidate Cumberland's real estate appraiser by threatening to report him to a local real estate board and then offered to pay the appraiser to conduct a second appraisal in an effort to compromise the appraiser as a witness and draw Cumberland's appraisal into question. Swidler also attempted to induce Cumberland's bank to make an adverse appraisal of the property by falsely representing that he wished to apply for a mortgage on the property and otherwise attempted to influence the bank. This behavior went far beyond a legitimate effort to investigate Cumberland and constituted an unwarranted attempt to use social and economic pressure to obstruct the prosecution of Cumberland's application.

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supra note 2. Subsequently, the Commission explained that the doctrine of collateral estoppel rather than *res judicata* applied. *WIOO, Inc.*, 68 FCC 2d 127 (1978). The application of collateral estoppel precludes relitigating the facts established in the FM proceeding.

[24] ID at Fdgs. para. 5. In its original Decision, the Board also concluded that WIOO's principal had committed perjury in an attempt to conceal his misconduct. However, on reconsideration, the Board deleted this conclusion.

[25] 54 FCC 2d at 699.

15. Ruling that WIOO was estopped from collaterally attacking the findings made by the Review Board in the FM proceeding, the ALJ rejected WIOO's additional proposed findings and conclusions based on newly submitted evidence in WIOO Exhs. 3–5.[26] These exhibits consist of affidavits by Swidler elaborating on respectively: Swidler's discussion with Cumberland's appraiser, his handling of the false jurats, and his dealings with the owner of Cumberland's proposed transmitter site.

16. In assessing the significance of the facts previously adjudicated in the FM proceeding, the ALJ noted that the established misconduct related only to the FM application and that the Commission had found no improprieties in the operation of the AM station since WIOO acquired the station in 1965. The ALJ concluded that "the facts established in the FM proceeding for which WIOO has already been severely penalized by virtue of the denial of its FM application, require only that WIOO be assessed a comparative demerit under the past broadcast record criterion rather than a determination . . . that it lacks the basic qualifications to be a Commission licensee."[27] The ALJ also stated that the comparative demerit arising from the FM misconduct "has no bearing on WIOO's operation."[28]

17. In its Exceptions, CBA asserts that WIOO's misconduct in the prior FM proceeding demonstrates that WIOO lacks the requisite character to be a Commission licensee. CBA disputes the ALJ's suggestion that WIOO's misconduct is irrelevant to its qualifications to be an AM licensee merely because it involved an FM application. CBA notes that WIOO is the same applicant, with the same principals as in the FM proceeding, and that the misconduct took place in the same community in which WIOO-AM is licensed. In light of the basic principle that a licensee must be relied upon to act in the public interest, CBA contends that WIOO's misconduct in the FM proceeding makes it undeserving of a public trust.

18. CBA especially criticizes the ALJ's statement that, since WIOO has already been "penalized" by the Commission's refusal to grant WIOO a *new* license in the FM proceeding, the facts require only that WIOO be assessed a comparative demerit under the past broadcast record criterion. It argues that the reference to a penalty is wrong as a matter of law because a broadcast license is a privilege grantable only to a fully qualified applicant and therefore its denial to an unfit applicant is not a penalty. Thus, in light of WIOO's egregious past conduct—an indication of its *future* behavior and bad character—CBA urges that WIOO is unfit to remain a Commission licensee.

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[26] ID at Concls. para. 2; Tr. 36–37.

[27] ID at Concls. para. 4.

[28] ID at Concls. para. 22.

19. The Bureau agrees with CBA that Swidler's misconduct in the same locale as the AM station reflects negatively on WIOO's probable future performance thereby warranting nonrenewal. In view of the seriousness of the FM misconduct, which occurred while WIOO was an AM licensee, the Bureau considers it specious to find that "[t]he Commission at no point has found any improprieties in the continuous operation of AM station WIOO since 1965 by Harold and Norman Swidler."[29] The Bureau also asserts that the ALJ ignored the fact that the Commission's Designation Order expressly found the previous FM misconduct relevant to WIOO's basic qualifications here. The Bureau also challenges the ALJ's characterization of WIOO's disqualification in the FM proceeding as a penalty.

20. WIOO responds that the ALJ fully considered the effect of the previously adjudicated adverse findings and correctly determined that WIOO should not be disqualified. WIOO maintains that a license may be renewed notwithstanding a prior license revocation in another proceeding for violations of Commission rules. WIOO submits that reform or rehabilitation is a relevant factor in determining the applicant's qualifications. In this regard, WIOO claims that the ALJ properly took into account the fact that the record contained no evidence that reflected adversely on WIOO's past programming or technical operation.

21. WIOO further argues that the ALJ erred in rejecting the introduction into evidence of WIOO's proposed Exhibits 3–5, relating to Swidler's motives in the FM proceeding regarding the false jurats and investigation issues. This evidence, if accepted would, according to WIOO, mitigate the adjudicated facts and lessen their effect on WIOO's qualifications for renewal. WIOO urges that no "relitigation" of issues precluded by collateral estoppel would be involved because the exhibits concern mitigating factors not considered previously. Alternatively, WIOO argues that, even if collateral estoppel does apply, it should not be applied rigidly in an administrative proceeding when public interest considerations, including a desire for a full record, support the introduction of the evidence. As to this argument, the Bureau asserts that the ALJ properly excluded evidence relating to the prior FM proceeding on the basis of collateral estoppel and that WIOO is clearly wrong in arguing that the evidence would not impact upon the previous factual determinations.[30]

22. As a preliminary matter, we affirm the ALJ's rejection of WIOO Exhs. 3–5. An examination of these exhibits reveals that they

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[29] ID at Concls. para. 4.

[30] The Bureau also observes that WIOO fails to refer specifically to the transcript pages which contain the ALJ's ruling as required by Section 1.277(a) of the Commission's Rules. In view of our disposition below, we do not reach this question.

deal with the same questions previously litigated in the FM proceeding. Each of these exhibits consists of an affidavit by Harold Swidler seeking to explain his motivation in connection with the incidents found by the Review Board to be disqualifying in the FM proceeding. WIOO Exh. 3 asserts the legitimacy of the discussion between Swidler and Cumberland's real estate appraiser. WIOO Exh. 4 asserts Swidler's good faith belief as to the genuineness of the signature and content of the affidavits found incompatible with the Commission's notarization requirements and asserts Swidler's reliance on the notary for proper performance. WIOO Exh. 5 asserts the propriety of Swidler's conduct in approaching the owners of Cumberland's proposed transmitter site. Clearly, these matters go to the heart of the Review Board's previous findings,[31] and their relitigation is barred by the doctrine of collateral estoppel.[32] Although WIOO argues generally that collateral estoppel should not be rigidly applied, we see nothing unduly rigid in applying the doctrine to exclude these exhibits in the interests of administrative finality and the avoidance of wasteful, duplicative proceedings.

23. Turning to the merits, we agree with the ALJ that the misconduct found in the prior FM proceeding does not require disqualifying WIOO here or assessing a significant comparative demerit. In a recent case, *Faulkner Radio, Inc.*,[33] we considered misconduct similar to that occurring here and elaborated upon the factors relevant to judging the full consequences of such misconduct. As in *Faulkner*, the misconduct involved in the instant case represents incidents occurring in one specific context—here, the comparative FM proceeding involving WIOO and Cumberland. In *Faulkner* there was no evidence that the disqualifying conduct pervaded the operations of Faulkner's remaining stations, and in this case there is no evidence that WIOO repeated its prior misconduct or engaged in misconduct of similar gravity in the course of the present comparative proceeding. We stated in *Faulkner* that, "Our principal concern is with misconduct disclosing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee . . . we have considered misconduct of a more limited nature a factor in not absolutely disqualifying . . . licensees." 88 FCC 2d at 616. Although the fact that the misconduct was limited to a single proceeding is not decisive in and of itself, *Id.* at 617–18, as in

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[31] *See* paras. 13–14 *supra.*

[32] *See Nasem* v. *Brown*, 595 F.2d 801 (D.C. Cir. 1979).

[33] 88 FCC 2d 612 (1981) (hereinafter *Faulkner*). In *Faulkner* a multiple owner had abused the Commission's processes by filing a strike petition to deny against a potential competitor in the market and committed misrepresentations in connection with the petition. After denying renewal of the station immediately involved in the misconduct, the Commission designated for hearing Faulkner's six other stations. The Commission ultimately concluded that loss of a single station represented an appropriate sanction.

Faulkner there is in this case another factor supporting the conclusion that WIOO's misconduct in the FM proceeding will not be repeated and that is the element of deterrence. The lost opportunity to acquire an FM station in a proceeding which was uncontested when the sanction was imposed deprived WIOO of something of substantial value and constituted a significant deterrent to the repetition of such misconduct by WIOO and others. This conclusion is borne out, again, by the fact that the misconduct was not repeated.[34] We conclude that, under these circumstances, we are reasonably assured that WIOO can be relied upon to carry out its responsibilities as a Commission licensee, and therefore it is appropriate to find WIOO basically qualified but to assess it a slight comparative demerit for its past misconduct.

B. *ASCERTAINMENT AND MISREPRESENTATION ISSUES*

24. The ALJ found[35] that the ascertainment section of WIOO's 1975 supplemental renewal application contained an exhibit which included: (1) a representation that a total of 81 community leaders were interviewed in February and March 1975;[36] and (2) *a representation that all interviews were conducted in* person, face-to-face, as required by Commission policy,[37] by Harold Swidler, president and general manager, David Dillon, program director, Douglas Weary, news director,[38] and Richard Harris, program director from January 1974 through February 21, 1975. During the interviewing period, the first three months of 1975, Harold Swidler personally conducted 63 consultations.

25. The circumstances surrounding the interviews not conducted by Swidler were disputed at the hearing. The ALJ made the following findings of fact as to these matters. Swidler testified that Dillon, Harris, and Weary volunteered to assist in the survey and that Swidler consequently instructed them to conduct personal

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[34] In *Faulkner* we did note the relevance of a third factor in determining whether an applicant should be found basically unqualified due to likelihood of recurrence: namely, whether or not the wrongdoer was a controlling principal of the licensee as opposed to an official not connected with the remaining stations. In *Faulkner* the responsible individual had been removed from the licensee; in this case, Swidler remains a 50% owner of WIOO. However, *Faulkner* shows that the three criteria, nature of the misconduct, deterrence, and personal attribution of responsibility are properly weighed cumulatively rather than separately and independently. These three criteria are used as predictors of likely future behavior. Here, we conclude that in view of all pertinent facts and circumstances, the third criterion does not have controlling significance.

[35] ID at Fdgs. paras. 6–23.

[36] A tabulation of the interview sheets shows that 83 community leaders were actually interviewed.

[37] *Community Problems—Broadcast Applicants*, 27 FCC 2d 650 (1971) (hereinafter *Primer*).

[38] Douglas Weary did not appear as a witness in this proceeding.

interviews. Although Swidler erroneously believed that the interviewee was required to fill out the survey form,[39] he recalled instructing his employees that it was necessary to conduct true face-to-face interviews. However, Swidler conceded that, because he assumed that his employees understood his instructions and conducted the interviews properly, he did not discuss with them whether they actually conducted valid interviews.

26. Contrary to Swidler's recollections, Harris testified that he did not recall volunteering to participate in the survey but rather that Swidler had asked him to participate. Harris could not recall Swidler ever instructing him how to conduct the survey or asking him to read any written material. Instead, Harris testified that he had been instructed as to proper survey techniques on his own initiative in a phone conversation with communications counsel. WIOO's communications counsel confirmed that a conversation with Harris took place. Moreover, Harris testified that Swidler never exercised any supervision or control over the conduct of the interviews. Harris also recalled Swidler stating that he, Swidler, was going to drop off a few questionnaires with friends. Although unable to recall WIOO's receiving the forms by return mail, Harris remembered viewing forms filled out in different colors of ink.

27. Dillon also testified that Swidler solicited his participation in the survey. Dillon testified that Swidler never showed him any survey instructional material provided by Washington counsel. Dillon also stated that he and Swidler telephoned persons on a prepared list to inform them that they were community leaders and to ask for their assistance. The leaders were advised that all they would be required to do was fill out a form that would be delivered that night and return it by mail or await pick-up by a WIOO employee. According to Dillon, Swidler and Dillon drove to the designated homes where Dillon purportedly instructed the person answering the door on how to fill out the form. Dillon recalled distributing ten interview sheets that night, but he did not know whether they were ever returned. He also recalled distributing two to six forms later and waiting as they were filled out. Dillon denies conducting any true interviews, although eleven of the forms show him as the "interviewer." According to Dillon, he merely completed the filled-out forms, for example, by putting in missing interview times and his signature. In response to this testimony, Swidler testified that he could not recall phoning community leaders with the help of Dillon. Furthermore, he denied driving anywhere with Dillon in connection with the survey operation.

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[39] The Commission's *Primer* does not require that a form be used or specify who should fill out a form if one is used. The *Primer* does prohibit use of a questionnaire in lieu of an interview. 27 FCC 2d at 668–69, 684. WIOO's communications counsel suggested that the interviewee *sign* the form as evidence that the interview took place. Tr. 191, 299.

28. WIOO introduced the testimony of eight community leaders who had filled out the forms, four of whom had no present recollection of the circumstances surrounding their completion of the form. Three of the witnesses recalled filling out the interview forms at Dillon's behest without any true interview taking place. One person, Delores Sunday, whom Dillon believed may have received a form during the car ride, recalled having been interviewed by Swidler, contrary to Dillon's assertions. Robert L. Matalonis, whom Dillon also believed received a form during the car ride, had no recollection of the circumstances under which he filled out the form.

29. The ALJ concluded[40] that WIOO's community leader survey substantially complied with the *Primer*. In addition to Swidler's 63 personal interviews, the ALJ found that Harris' four and Weary's five interviews were personal meetings conducted in compliance with the *Primer*. However, Dillon's eleven "interviews" were found invalid, because Dillon conducted no true interviews in compliance with the *Primer*. The ALJ did not, however, invalidate WIOO's entire survey because of Dillon's eleven deficient interviews.

30. With regard to the misrepresentation issue, the ALJ concluded that the evidence was not conclusive that any witness had intentionally lied about Swidler's supervision of the survey. The ALJ found that Swidler was a sincere and candid witness, whereas Dillon vacillated in his testimony and retracted some statements. In view of the length of time that had elapsed since the ascertainment interviews were conducted, the ALJ concluded that discrepancies between Swidler's testimony and that of Harris and Dillon may have resulted from dimmed memories, particularly since Swidler may not have relied upon or paid careful attention to the Harris and Dillon interviews because Swidler considered Harris and Dillon "just kids." However, the ALJ also concluded that Swidler should have made a greater effort to supervise the conduct of the young employees in the survey process, especially Dillon. Rejecting Swidler's excuse that he did not rely on their work anyway, the ALJ assessed WIOO a slight comparative demerit for Swidler's "being derelict" in his supervisory responsibilities.

31. CBA contends in its Exceptions that, at the very least, WIOO's survey is seriously tainted by Dillon's failure to conduct personal interviews, as required by the *Primer*, a direct result of Harold Swidler's improper instructions and negligent supervision. Moreover, CBA contends that the Commission cannot rely on Swidler's representation that he personally conducted 63 valid face-to-face interviews in light of his misrepresentations in the FM proceeding and the adverse testimony by Harris and Dillon in this proceeding. CBA submits that, in light of Harris and Dillon's

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[40] ID at Concls. paras. 5–10.

testimony, Swidler himself may not have conducted full face-to-face interviews on every occasion, as claimed.

32. CBA maintains that the discrepancies between Swidler's testimony and that of Harris and Dillon could not have resulted from dimmed memories or ambiguity and that Swidler lied when he testified that he instructed his employees on the proper survey methodology. CBA notes that both Harris and Dillon, two unbiased witnesses, clearly denied having been so instructed. CBA also argues that the ALJ should have believed Dillon's version of the circumstances surrounding the evening car ride to distribute questionnaires instead of the testimony of Harold Swidler, a financially interested witness. CBA concludes that on the basis of the improperly conducted survey and WIOO's misrepresentations, WIOO should be disqualified.

33. The Bureau also claims that Harold Swidler lied in his testimony about the circumstances surrounding his employees' survey of community leaders. The Bureau maintains that the testimony of Swidler, who has a pecuniary interest in the proceeding, is directly contradicted by that of two unbiased witnesses, former station employees Harris and Dillon. In the Bureau's view, this fact undermines the significance of the ALJ's demeanor findings.[41] The Bureau points to Dillon's certainty that Swidler instructed him merely to pass out forms and that no personal interview was necessary. Moreover, both Dillon and Harris absolutely denied having been instructed by Swidler in proper survey methodology, testimony which the Bureau asserts the ALJ ignored. Further, the Bureau contends that Dillon's credibility cannot be discounted simply because he honestly stated he could not remember certain specific events. In light of the above, the Bureau concludes that the ALJ erred in accepting the unsubstantiated and contradicted testimony of Swidler in preference to that of the two station employees and in assessing only a slight comparative demerit against WIOO.

34. In reply, WIOO asserts that the ALJ correctly assessed the substance of the witnesses' testimony and their credibility. In WIOO's view, it is of particular significance, that Dillon's testimony was inconsistent and sometimes incorrect. WIOO maintains that additional findings would further undermine Dillon's credibility. WIOO does not object to the ALJ's assessment of a slight, ultimately insignificant demerit for Swidler's inadequate supervision of the ascertainment operation.[42]

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[41] The Bureau challenges the ALJ's demeanor findings with respect to Harold Swidler. Citing *Lebanon Valley Radio, Inc.*, v. *FCC*, 503 F.2d 196, 200 (D.C. Cir. 1974), it argues that these findings are not necessarily controlling where, as here, there are substantial underlying questions about the accuracy of those findings.

[42] Reply to Exceptions, filed August 20, 1979, by WIOO, Inc., at 4.

35. We substantially agree with the ALJ's findings on this issue.[43] In many crucial respects, the testimony of the two disinterested witnesses, Dillon and Harris, contradicted that of Swidler. Nevertheless, on balance, we believe there is insufficient independent evidence to rebut the ALJ's finding that Swidler was a sincere and candid witness and that discrepancies in the testimony were due to faulty memory of all parties. For example, as to two questions—whether Swidler requested the assistance of Dillon and Harris and to what extent he instructed them—the record supports a conclusion that the conflict in testimony may simply have resulted from self-serving recollection and that no misrepresentation occurred. Although some extrinsic evidence supports the Harris-Dillon version of events,[44] the nature of the questions involved lends itself to honest differences in interpretation.[45] A more striking conflict in the record concerns Dillon's testimony that he and Swidler spent an evening driving around Carlisle dropping off survey forms to be mailed back to the station.[46] Swidler flatly denies this allegation.[47] Dillon's credibility on this point is weakened, despite his apparent certainty, by his inability to establish that any particular person had been contacted in this way, and, in particular, by his misidentification of Delores Sunday as being such a person.[48] Similarly, Dillon was uncertain about the time frame in which he contacted other individuals. Dillon recalled making all of his contacts, *i.e.*, those in which he stood by while the "interviewees" filled out the survey forms, within two days.[49] The forms themselves, however, bear dates covering more than a week.[50] Thus, the record does not contain a

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[43] The adequacy of WIOO's ascertainment survey per se has been mooted by the Commission's action in *Deregulation of Radio*, 84 FCC 2d 968, *recon. granted in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of the United Church of Christ* v. *FCC*, No. 81–1032 (D.C. Cir. May 10, 1983). There, we eliminated formal ascertainment requirements for radio applicants. However, this action did not moot the significance of misconduct committed in connection with an ascertainment survey, as licensees and applicants are expected to comply with relevant rules and policies while they are in effect and not to commit misrepresentations. 84 FCC 2d at 1012–13.

[44] For example, WIOO's communications counsel confirms that Harris called him about the survey as Harris claims. Tr. 189, 283, 289, 316; Bureau Exh. 6.

[45] For example, Harris was initially uncertain whether Swidler asked him to participate or whether he volunteered. Tr. 188.

[46] Tr. 129–31.

[47] Tr. 77.

[48] Tr. 147, 158–60, 227–28. Dillon believes he may have mistaken the name of Delores (Mrs. Creeden) Sunday for Creigh Snyder, another interviewee. Tr. 238. Dillon's firmest recollection of the trip was driving to the house of Robert L. Matalonis. Tr. 159. Matalonis has no recollection of how he received the interview form. Tr. 401.

[49] Tr. 136.

[50] One interviewee, James W. DuCharme, recalled Dillon contacting him March 18, 1975. Tr. 317–33. Another Mary P. Sandels, recalled a contact March 26. Tr. 348–64. *See also* WIOO Exh. 7 at 5, 7.

firm basis for preferring Dillon's testimony over that of Swidler, given the ALJ's demeanor findings. Moreover, the ALJ found that Harold Swidler was a "sincere and candid witness." ID at Concls. para. 9. The Commission has consistently held that "Absent abuse of discretion by the Judge or the existence of facts bearing on character disqualification of the witnesses which make unnecessary reliance by the Judge upon the witnesses' demeanor, we will not . . . substitute our judgment concerning the credibility of the witness for that of the trier of fact."[51]

36. However, even assuming that Swidler did not make misrepresentations about the community leader survey, we agree with the ALJ that he should be assessed a slight comparative demerit for his lack of due care in connection with the survey. On this point the testimony of the witnesses is not in sharp conflict. Both Harris and Dillon assert that Swidler did not give them adequate supervision.[52] Swidler's own testimony does little to contradict this assertion. He concedes that his supervision of Harris and Dillon consisted of a brief oral statement without discussion accompanied by a copy of a memorandum from WIOO's communication's counsel.[53] We discount Swidler's suggestion that he watched Harris and Dillon read the entire lengthy memorandum.[54] Swidler also admits that he exercised no oversight over the actual conduct of the interviews and did not review Dillon's and Harris' methodology once the interviews were completed.[55] Moreover, Swidler admits that he did not give much attention to Harris and Dillon because he considered them "just young kids"—and did not "rely" on their interviews.[56] Harris' interviews were conducted properly, only because Harris independently consulted WIOO's communications counsel, and Dillon's interviews were not properly conducted.[57] Thus, although Swidler's statements concerning the ascertainment survey, including the statement in WIOO's renewal application that all interviews had been face-to-face consultations,[58] cannot be regarded as misrepresentations, they do reflect a lack of due care. We therefore concur with the ALJ's judgment that a slight comparative demerit is warranted.[59]

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[51] *Radio Carrollton*, 52 FCC 2d 1173, 1180 (1975), *remanded on other grounds sub nom. Faulkner Radio, Inc.* v. *FCC*, 557 F.2d 866 (D.C. Cir. 1977). *Compare Lebanon Valley Radio, Inc.* v. *FCC, supra* note 41; *The Prattville Broadcasting Co.*, 5 FCC 2d 601 (Rev. Bd. 1966).

[52] Tr. 128, 212, 214.

[53] Tr. 53, 55–57, 82–83, 85.

[54] Tr. 56, 84. BB Exh. 5 (The 33 page memorandum).

[55] Tr. 57, 78–79, 86.

[56] Tr. 54, 86.

[57] Tr. 189, 214.

[58] BB Exh. 4 at 2.

[59] *Accord, Fox River Broadcasting, Inc.*, 53 RR 2d 44 (1983).

IV. *CBA'S IMPROPERLY EXECUTED AMENDMENTS ISSUE*

37. The ALJ found[60] that on June 2, 1977, CBA's Counsel, under time pressure to submit a current transmitter site lease option to the Commission, asked Gerald Fried, CBA's 30% partner to execute two affidavits for submission with amendments reporting a new lease option.[61] The affidavits recited that Fried had read the amendments' contents and attested to their accuracy. Fried executed these affidavits although he did not then possess all of the documents he intended to include in the amendments. However, it was his understanding from prior discussions with the real estate agent representing the landowner, that CBA's lease option would be extended and the proper documentation supplied for inclusion in the amendment. Fried received a letter from the agent dated June 16, 1977 agreeing to a new option. He forwarded the letter to counsel, who submitted it to the Commission as an amendment on June 23, attached to one of the June 2 affidavits. Subsequently, Fried received and forwarded the actual lease option, dated July 7, 1977. Counsel submitted the option, attached to the other June 2 affidavit on July 14. Fried testified that he thought his counsel understood the agent's letter and the new lease option to have been in existence on June 2, 1977 and that counsel was concerned about potential delays in the mail. At the time Fried signed the affidavits, he did not believe that the procedure was improper. The ALJ found no evidence that the contents of the amendments were inaccurate when submitted.[62] Concluding that there was no intention to mislead the Commission by these filings, the ALJ imposed a significant comparative demerit against CBA, for Fried's "careless and inattentive filing of amendments," rejecting as irrelevant Fried's explanation that execution of the affidavits was his counsel's idea.[63]

38. CBA argues that the evidence on this issue does not warrant the imposition of a significant comparative demerit. Although CBA's amendments contained documents which did not exist at the time of Fried's June 2, 1977 attestation, Fried testified that on that date he had good reason to anticipate receiving such documents promptly. Moreover, CBA attempted to show that Fried's counsel was under the false impression that the documents were already in existence. CBA points out that the ALJ made two favorable findings in this regard: (1) the record did not indicate that the contents of the amendments were inaccurate when filed, and (2) there was no intention to mislead or deceive the Commission.[64] CBA asserts that the imposition of a *significant* comparative demerit does not comport

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[60] ID at Fdgs. paras. 26 - 27.

[61] The Commission had directed CBA to submit a current option by June 25. Tr. 108.

[62] ID at Concls. para. 12.

[63] ID at Concls. paras. 13 and 22.

[64] ID at Concls. paras. 12–13.

with the above findings. While CBA recognizes that some demerit is appropriate, it states that this isolated inadvertent error merits only a slight demerit.

39. We agree with the ALJ that Fried's premature execution of affidavits, stating that he read and considered accurate amendments to CBA's application, warrants a demerit, but we do not agree with the ALJ's characterization of this demerit. Although Fried's procedure was irregular, there was no intention to mislead the Commission and no significant abrogation of responsibility. When Fried executed the affidavit, he anticipated that he would receive and thus have the opportunity to review the documents comprising the amendment before they were submitted to the Commission.[65] Fried in fact did review the documents prior to their submission.[66] We therefore consider Fried's premature execution of the affidavits an isolated error deserving of no more than a slight demerit.[67]

V. *STANDARD COMPARATIVE ISSUE*

A. *RENEWAL EXPECTANCY*

40. The ALJ acknowledged that "the fact of [WIOO's] incumbency without more is legally irrelevant under the statute."[68] Since the record was devoid of any programming evidence concerning WIOO's past broadcast operations, the ALJ stated that the "renewal expectancy cannot be placed on the decisional scale."[69] She noted, however, that "WIOO has been operated by the Swidlers since 1965. The fact that no issues have been included derogating the programming or technical operation of WIOO during this lenghty period had some predictive value and must count as at least a thumb on the scale."[70]

41. CBA complains that the ALJ's findings and conclusions concerning the significance of WIOO's past record are contradictory. In CBA's view, the ALJ was correct when she acknowledged that the fact of incumbency without more is legally irrelevant. Yet, according to CBA, the ALJ seemingly awarded WIOO extra credit for incumbency alone by finding that the absence of technical or programming violations "must count for at least a thumb on the scale" in WIOO's favor. CBA asserts that the treatment of WIOO's past broadcast record in this manner by the ALJ, without evidentiary support, constitutes error. WIOO responds that its unblemished operational record supports the ALJ's conclusions.

42. We agree with CBA that it was inappropriate for the ALJ to

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[65] Tr. 103, 112–13, 120.

[66] Tr. 96–97, 100.

[67] *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980).

[68] ID at Concls. para. 21.

[69] *Id.*

[70] *Id.*

find that WIOO deserved a "thumb on the scale" on the facts of this case. A renewal expectancy must be grounded on a showing that the incumbent's past broadcast record has been substantial.[71] There is no showing in the record here as to WIOO's past broadcast performance. The licensee was aware of and had the opportunity to introduce any pertinent evidence reflecting its prior service but failed to do so.[72] Without this showing, WIOO has foregone any advantage it could have accrued as a renewal applicant, and WIOO and CBA must be compared as if they were both applicants for new facilities.[73]

B. *CHARACTER*

43. The ALJ did not consider character as a separate criterion. However, her discussion of the overall comparative evaluation of the applicants suggests that she implicitly accorded WIOO a significant preference on this point.[74] As our preceding discussion indicates, we do not agree with the ALJ's assessment of the misconduct committed by CBA's principal, Fried.[75] We conclude, considering the pertinent findings under the FM misconduct, ascertainment misrepresentation, and improperly executed amendments issues, that CBA, not WIOO, deserves a preference for character. The misconduct attributable to CBA is of a less serious nature than that attributable to WIOO. However, because all of the demerits under consideration in this matter are slight, we conclude that CBA's overall character preference can be no more than slight.[76]

C. *INTEGRATION*

44. The ALJ granted WIOO a "significant and substantial" preference for integration of ownership into management.[77] WIOO received credit for the full-time integration of its 50% owner Harold Swidler as general manager and the part-time integration of its 50% owner Norman Swidler.[78] The ALJ further found that the Swidler's

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[71] *See Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *appeal docketed sub nom. Victor Broadcasting, Inc.* v. *FCC*, No. 82-1964 (D.C. Cir. August 20, 1982); *Cowles Broadcasting, Inc.*, *supra* note 16.

[72] As noted in para. 11, *supra*, we will deny WIOO's belated request for the Commission to reopen the record for evidence of its past performance.

[73] *See Simon Geller*, 90 FCC 2d 250 (1982), *appeal docketed sub nom. Committee for Community Access* v. *FCC*, No. 82-2314 (D.C. Cir. November 2, 1982). The comparison of new applicants is governed by the 1965 *Policy Statement*, *supra* note 15.

[74] ID at Concls. para. 22.

[75] *Supra* para. 40.

[76] As previously noted, WIOO seeks to enlarge the issues against CBA, alleging that CBA has violated the Commission's reporting rules, but these allegations even if proved, would not likely affect our evaluation of the applicants in any decisionally significant way. *See* para. 8, *supra*.

[77] ID at Concls. para. 19.

integration credit was enhanced by their long time local residence in Carlisle, participation in local civic activities, and previous broadcast experience. CBA received credit for the full-time integration of its 30% owner James P. O'Leary and for an unspecified amount of part-time integration in the business and public affairs aspects of the proposed station by its 30% owner Gerald Fried. The ALJ found CBA's principals inferior to WIOO's with respect to the various enhancing factors. None of CBA's principals are Carlisle residents, O'Leary being a resident of Mechanicsburg, Pennsylvania, 10 miles from Carlisle, and Fried being a resident of Harrisburg, Pennsylvania, 18 miles from Carlisle. Further, although O'Leary has previous broadcasting experience, he has not served in a management capacity.

45. CBA takes issue with the ALJ's assessment that WIOO deserved a substantial and decisionally significant preference under the integration criterion. First, CBA contends that the ALJ erred in simply asserting—without substantial record support—that the Swidlers were active in community (Carlisle) affairs.[79] As a related matter, CBA contends that the ALJ wrongly ignored evidence it produced demonstrating the extensive involvement of CBA principals in non-Carlisle based organizations which serve that community. Second, CBA argues that the ALJ made an unsubstantiated finding that Norman Swidler devotes substantial time to the station on a daily basis. CBA argues that the ALJ impermissibly relied on a finding made in the 1973–74 FM proceeding that Norman Swidler assisted approximately 2–3 hours per day at the AM station. Since the ALJ considered the record vague "on the matter of the actual day-to-day participation of Norman Swidler," CBA asserts that she erred in ultimately crediting WIOO with even partial integration

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[78] The ALJ discounted, in part, WIOO Exh. 1 proposing that Norman Swidler would be engaged full-time in the station's operation and made the following conclusion to which WIOO specifically excepts:

> Norman Swidler was not called as a witness in this proceeding and there is no evidence as to the actual amount of time he devotes to the station on a day-to-day basis. In Exhibit 7 of WIOO's renewal application (File No. BR-4546) having to do with the staff of station WIOO, both Harold and Norman Swidler are listed under the heading 'administrative'. Looking back to the 1973–74 FM proceeding, it is noted that the Presiding Judge there found that Norman Swidler consults continuously with Harold Swidler on matters relating to the day-to-day operation of station WIOO. He assists in the soliciting and serving of local area accounts and also contacts public service organizations for spot announcements and programs on their behalf. Approximately 2 to 3 hours per day are involved in these matters. *WIOO, Inc.*, 54 FCC 2d at 712, 743–744.

ID at Concls. para. 19 n.7.

[79] According to CBA, the ALJ seems to have based her finding solely on WIOO's statement in its Exhibit 1 that the Swidlers "are active in community affairs." *See* ID at Fdgs. para. 4.

credit for Norman Swidler. Finally, CBA observes that in a recent case[80] the Commission discounted the quality of an integration proposal when the principal involved had a deficient past broadcast record. In light of Swidler's misconduct in the FM proceeding, CBA argues that WIOO should be accorded no credit for its proposal to integrate a person so clearly deficient in character.

46. WIOO asserts that its proposed 100% integration of ownership into management is clearly superior to CBA's proposal for 30% full-time and 30% part-time integration. WIOO contends that the ALJ erred in not crediting WIOO with 100% full-time integration. WIOO disputes the ALJ's seeming adoption of findings from the prior FM proceeding concerning Norman Swidler's partial integration and submits that Exh. 7 to WIOO's Application, which lists Harold and Norman Swidler as "Administrative" establishes full-time integration. It asserts that the ALJ's final award of a partial integration credit for Norman Swidler, based on the off-the-record record findings, is inconsistent with her earlier findings that the Swidlers are engaged in the full-time operation of WIOO.[81]

47. We find that WIOO is entitled to credit for Harold Swidler's full-time integration and that CBA is entitled to credit for O'Leary's full-time integration. Thus, WIOO receives 50% full-time integration credit and CBA receives 30% full-time integration credit.

48. Neither applicant is entitled to any credit for part-time integration, as the record does not establish the nature or extent of part-time integration by either Norman Swidler or Fried with reasonable certainty.[82] Specifically, the record does not support credit for Norman Swidler's alleged participation, since WIOO has failed to specify how many hours each week he will devote to station management, or to describe what his role as "Administrative" personnel, as listed in WIOO's application, entails.[83] Because of this failure of evidence, the ALJ apparently relied for her conclusion in giving partial credit for his integration on findings made in the 1973–74 FM proceeding that Norman participates 2–3 hours daily at WIOO-AM. The ALJ's reference to an off-the-record finding in a proceeding to which CBA was not a party was inappropriate and not a proper subject for official notice.[84]

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[80] *Gainesville Media, Inc.*, 72 FCC 2d 795 (1979).

[81] *Compare* ID at Fdgs. para. 4 *with* ID at Concls. para. 19 n. 7.

[82] *See Deep South Radio, Inc.*, 46 RR 2d 1657 (1980); *RAM Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976); *Mt. Carmel Broadcasting Co.*, 13 FCC 2d 155 (Rev. Bd. 1968).

[83] The record cannot support a finding, urged by WIOO, that it be granted credit for the full-time integration of Norman Swidler. While WIOO based on the vague language of its application and a hearing exhibit argues in its Exceptions that Norman will be involved full-time, the licensee failed to introduce any clarifying or supporting evidence establishing such participation.

[84] Official notice is generally reserved for undisputed facts or those easily verifiable. *See* Fed. Rules Evid. Rule 201(b): *Midwest Television, Inc.* v. *FCC*, 426 F.2d 1222

49. WIOO's quantitative superiority is somewhat diminished by qualitative factors. In this regard, we do not agree with the ALJ's assessment of these factors in favor of WIOO. CBA as well as WIOO is entitled to some credit for local residence because its integrated principal O'Leary resides within the proposed station's service area although not in Carlisle and has participated in area wide civic activities.[85] WIOO is not entitled to any credit for the Swidlers' civic participation because the nature of this participation is not specified.[86] Although WIOO deserves an advantage for broadcast experience, there is also the disadvantage accruing from Swidler's misconduct discussed in connection with the FM misconduct and ascertainment misrepresentation issues.[87] On balance, considering both qualitative and quantitative factors, especially in view of the fact that WIOO proposes to integrate a 50% ownership interest, WIOO merits a moderate integration advantage.[88]

D. *DIVERSIFICATION*

50. At the time the Initial Decision issued, the record reflected that neither applicant owned outside media interests.[89] However, it appears that CBA's principals have recently acquired such interests.[90] CBA's 30% partner, James P. O'Leary, and its 10% partner, Arthur Sherman, each have a 50% interest in Laurel Broadcasting Company, which has acquired station WISL, Shamokin, Pennsylvania. O'Leary is also a 20% owner of Quaker State Broadcasting Corporation, which acquired station WQVE-FM, Mechanicsburg, Pennsylvania. These interests, one of which is in the service area of the Carlisle station and the other a short distance away, warrant a substantial diversification preference in favor of WIOO.[91]

(D.C. Cir. 1970). Even assuming that the ALJ's reliance on previous findings was correct, 2–3 hours of daily work at a station falls below the 20 hour minimum for an award of partial integration credit established in *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (Rev. Bd. 1979), *rev. denied*, FCC 79–397, released June 22, 1979.

[85] *See Waters Broadcasting Corp.*, 52 RR 2d 1063 (1982), *appeal docketed sub nom. West Michigan Broadcasting Co.* v. *FCC*, No. 82–2513 (D.C. Cir. December 22, 1982).

[86] The ALJ based her finding concerning the Swidlers' local civic activities on a statement in WIOO's Exhibit 1 that the Swidlers' were "active in community affairs."

[87] We note that in some past cases, misconduct by an integrated owner has detracted from the value of the integration proposal to a greater extent. *Gainesville Media, Inc., supra*, note 80; *East St. Louis Broadcasting Co.*, 29 FCC 2d 170 (1971). However, as we have concluded that the misconduct found here has only a slight impact on the applicant's qualifications and did not involve misconduct in the course of station operation, we believe a less extreme treatment is warranted. *Accord, Fox River Broadcasting, Inc., supra* note 59.

[88] *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982), application for review pending.

[89] ID at Concls. para. 17.

[90] Official notice of these interests is taken as explained at para. 8 *supra*.

[91] *See Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977).

E. *OVERALL COMPARATIVE EVALUATION*

51. In the overall comparative analysis, the ALJ first noted the significant comparative demerit assessed against CBA for its carelessness in the amendment process. As to WIOO, the ALJ concluded that the comparative demerits for its FM misconduct and lack of supervision over ascertainment,[92] were outweighed by its significant integration preference in addition to "the fact that there is no evidence in this regard which derogates [WIOO's] past programming efforts or technical operation."[93] The ALJ ultimately concluded that WIOO has the requisite qualifications to remain a Commission licensee and that its renewal would serve the public interest, convenience, and necessity.

52. We agree that WIOO is the preferred applicant.[94] WIOO deserves a slight advantage under the factor of best practicable service to the public. In our judgment, WIOO's moderate integration advantage is sufficient to offset CBA's slight preference for character. WIOO also deserves a substantial preference under the other primary comparative factor, diversification, based on the fact that only CBA's principals own outside media interests. In view of the foregoing comparative analysis, the public interest favors a grant of WIOO's application for license renewal and the denial of CBA's mutually exclusive application.

53. ACCORDINGLY, IT IS ORDERED, That the Exceptions, filed August 8, 1979, by Carlisle Broadcasting Associates and the Chief, Broadcast Bureau, and the Limited Exceptions, filed August 9, 1979, by WIOO, Inc., ARE DENIED; that the Initial Decision herein, FCC 79D-28, released July 9, 1979, IS AFFIRMED; that the Application of WIOO, Inc. for renewal of its license to operate station WIOO, Carlisle, Pennsylvania (File No. BR-4546) IS GRANTED; and the Application of Carlisle Broadcasting Associates for a construction permit (File No. BP-19, 978) IS DENIED.

54. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues and for Further Hearing, filed June 28, 1982, by WIOO, Inc. IS DENIED to the extent indicated herein, that the Petition for Leave to Amend, filed July 19, 1982, by Carlisle Broadcasting Associates IS GRANTED and the attached amendment IS ACCEPTED, and that the record IS REOPENED and official notice taken of CBA's newly acquired media interests.

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[92] ID at Concls. para. 22. The ALJ did not consider the dispute over the exact nature of the station employees' assistance in the ascertainment survey to be materially significant.

[93] In the ALJ's view, the comparative demerit stemming from the denial of the FM application "has no bearing on WIOO's operation." *Id.*

[94] Under the 1965 *Policy Statement, supra* note 15, the two primary factors considered are best practicable service to the public and diversification of control of the media of mass communications. As previously mentioned, WIOO is entitled to no renewal expectancy.

55. IT IS FURTHER ORDERED, That the Petition to Accept Late filed Pleading, filed August 9, 1979, by WIOO, Inc. IS GRANTED.

56. IT IS FURTHER ORDERED, That the Letter, filed December 4, 1979, by Carlisle Broadcasting Associates and the Motion to Strike Letter, filed December 12, 1979, and the Motion for Leave to File, filed August 27, 1982, by WIOO, Inc. ARE DISMISSED as moot.

57. IT IS FURTHER ORDERED, That the Petition to Reopen the Record for Past Broadcast Record Testimony, filed August 10, 1982, by WIOO, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: WIOO, Inc. Carlisle, Pa. AM Radio Comparative Renewal Proceeding

The dispositive issue here is whether WIOO, Inc. is basically qualified to retain this broadcast license. Based on the facts, precedent and policy, I find it all but impossible to rationalize the majority's conclusion that WIOO, Inc. is indeed basically qualified.

In 1975, the Review Board disqualified WIOO from obtaining a new FM station in Carlisle.[1] WIOO's disqualification was premised on the misconduct of Harold Swidler, WIOO's 50 percent principal, who filed numerous false jurats and seriously abused the Commission's processes in an effort to discredit the competing applicant in the proceeding.[2] Meanwhile, in connection with the instant comparative renewal proceeding, the record strongly suggests that WIOO, Inc. misrepresented facts to the Commission.[3]

With this record before it, the majority should have concluded that WIOO, Inc. lacks the basic qualifications to retain the license for WIOO-AM. However, in a surprising display of charity, the majority has downplayed the seriousness of WIOO's misconduct and assessed two "slight" comparative demerits for the licensee's infractions. As for the misconduct involving attempts to discredit the competing applicant in the prior FM case, the majority reasons that the wrongdoing occurred in another proceeding, that there is no evidence that it was repeated at the AM facility, and that the deterrent value of WIOO's prior disqualification is significant. This totality of factors leads the majority to be "reasonably assured" that WIOO will properly carry out its licensee responsibilities in the future. Later in its decision, the majority comfortably disposes of its adverse findings under the misrepresentation issue, apparently finding no predictive significance in additional misconduct by Harold Swidler, the majority stockholder responsible for the FM misconduct.

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[1] *WIOO, Inc.*, 54 FCC 2d 692 (Rev. Bd.), *modified*, 56 FCC 2d 817 (Rev. Bd. 1975), *rev. denied*, FCC 76–892, released Sept. 28, 1976.

[2] The Review Board found that WIOO "on several occasions went beyond the limits of permissible investigation . . . in a manner 'reasonably and seriously calculated' to dissuade [the competing applicant] from continuing [its] involvement in this proceeding," and that WIOO's record, taken as a whole, demonstrated "an overall pattern of condemnable conduct." *Id.*, 54 FCC 2d at 708 and 709. The misconduct in question occurred after WIOO filed its 1972 license renewal application and was resolved adversely to WIOO in 1975, the year in which its supplemental renewal application was filed.

[3] *See Decision* paras. 24 *et seq.*

The majority's decision, which is a testament to the hollowness of the comparative renewal process, is contrary to the record and applicable precedent. As for the ascertainment misrepresentation issue, the majority's deference to the ALJ's finding that Harold Swidler was a sincere and candid witness is unwarranted.[4] While demeanor findings are ordinarily entitled to great weight, we have previously rejected such findings when they are contradicted by the record as a whole.[5] The record here leads one to conclude that Harold Swidler intentionally misrepresented facts concerning WIOO's ascertainment survey. The significance of the ascertainment issue itself is not overwhelming. However, it is the fact of a licensee's misrepresentation and not the particular facts being misrepresented that is important.[6] Given Harold Swidler's prior misconduct and the absence of any evidence that Swidler has been rehabilitated, his misrepresentation in this proceeding is particularly significant. Even assuming *arguendo* that Swidler's misconduct amounted to no more than negligence, as the majority here holds, that finding cannot help but reinforce the Commission's preexisting doubts (as evidenced by the inclusion of an issue regarding WIOO's prior misconduct in the designation order in this case) about WIOO's trustworthiness as a Commission licensee.

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[4] The ascertainment survey misrepresentation issue centered on whether Swidler intentionally misrepresented the fact that all community leader surveys were conducted face-to-face. Hearing testimony by two unbiased witnesses who assisted in the survey effort directly contradicted Swidler's version of events. Nevertheless, and despite the fact that Swidler's own counsel corroborated testimony given by one of the witnesses against Swidler, the ALJ chose to believe the explanation provided by Swidler, who had a significant pecuniary interest in the outcome of this case. The reliability of these demeanor findings is cast further into doubt in view of the inconsistency between the ALJ's finding that Swidler was candid and sincere and the ALJ's later finding that Swidler had indeed been negligent, contrary to Swidler's hearing testimony.

[5] *See Lebanon Valley Radio, Inc.* v. *FCC,* 503 F.2d 196, 200 (D.C, Cir. 1974); *cf. Fox River Broadcasting, Inc.,* __ FCC 2d __, 53 RR 2d 44 (1983) (effectively ignoring ALJ's demeanor findings).

[6] *See generally FCC* v. *WOKO, Inc.,* 329 U.S. 223 (1946).

To discount Harold Swidler's prior misconduct in the FM proceeding, the majority squarely relies upon *Faulkner Radio, Inc.*[7] However, the majority stands *Faulkner* on its head. In *Faulkner*, a multiple owner abused the Commission's processes by filing a strike petition to deny against a potential competitor and made misrepresentations in connection with the strike petition. As a result, the Commission designated for hearing the license of the station located in the community where the misconduct occurred and ultimately denied that license on basic qualifications grounds. Thereafter, the licenses of all other commonly controlled stations were designated for briefing and oral argument. Applying a three-factor analytic framework (which considered the nature of the prior misconduct, attribution of personal responsibility within the licensee, and the anticipated deterrent effect of the prior license loss), the Commission ultimately renewed Faulkner's other licenses. However, its decision was based on considerations lacking here.

Significantly, and contrary to the majority's reasoning in this case, *Faulkner* gave little credence to the licensee's argument that other license denials would be improper because the misconduct in question was an isolated incident involving only one station. The Commission stated that it could not assume that a willingness to abuse its processes and to commit misrepresentations would necessarily be confined to a single episode. Instead, decisive in the renewal of Faulkner's other licenses were that the wrongdoer was a comparatively minor corporate stockholder no longer associated with the multiple owner, and the belief that non-renewal of the station in question was a significant deterrent to future wrongdoing. The Commission nevertheless specifically conditioned Faulkner's license renewals on the continued exclusion of the departed wrongdoer from any participation in the licensee or its operations.

Faithful adherence to the teachings of *Faulkner* requires disqualification of WIOO, Inc.[8] Like the misconduct in that case, the acts in question here have implications beyond their immediate context. Licensees of this Commission have fundamental obligations to avoid predatory conduct, to respect the integrity of the Commission's processes, and to be candid and forthright in dealing with this agency. As the Commission said in *Faulkner*:

> "We cannot automatically assume that a willingness to employ anticompetitive and abusive practices will not carry over into the operation of other stations, especially where, as here, the licensee does not unequivocally admit the wrongness of its conduct. Moreover, this case involved extensive misrepresenta-

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[7] 88 FCC 2d 612 (1981) (*Faulkner*).

[8] *See also Rocket Radio, Inc*, 86 FCC 2d 655 (1981) (non-comparative renewal application designated for hearing to determine whether licensee possesses requisite qualifications in light of prior disqualification in initial licensing case for abuse of process and misrepresentation).

tion. Again, we cannot automatically assume that a pattern of misrepresentation will necessarily be kept within the confines of a particular situation."[9]

The record established by WIOO when it attempted to acquire a license to operate an FM station, coupled with the record of additional misconduct in this case, strongly suggest that WIOO cannot be expected to satisfy the high standards of trust required of FCC licensees, or to operate its facility in conformity with applicable statutes, rules and policies. This conclusion is reinforced by WIOO's refusal to admit unequivocally the wrongness of its prior FM misconduct.

Furthermore, and in sharp contrast to *Faulkner*, WIOO is still controlled and operated by the individual previously found guilty of reprehensible conduct. As indicated earlier, Harold Swidler to this day continues as WIOO's President, General Manager, and fifty percent stockholder.[10] The majority acknowledges Swidler's continued involvement in a footnote but observes inscrutibly that "in view of all pertinent facts and circumstances, the third criterion [personal attribution of wrongdoing] does not have controlling significance."[11]

Since the deterrence considerations found important in *Faulkner* are also significantly different here, contrary to the majority's contention, one wonders exactly what facts and circumstances persuaded the majority that WIOO can now be trusted to be a Commission licensee. Unlike *Faulkner*, WIOO has not lost an existing broadcast station, but simply the opportunity to acquire a new one in a particular case. The importance of the distinction is far from academic. For example, if a licensee may obstruct potential competition with the only consequence being denial of its application for a new station, as here, the instances of such abusive conduct are likely to increase. Under the majority's approach, as long as an unscrupulous and predatory licensee attempts to discredit a prospective competitor by filing a mutually exclusive application, as WIOO did, rather than by filing a petition to deny, as in *Faulkner*, it will be able to harrass potential competitors without jeopardizing any of its FCC licenses. At worst, its conduct will be discovered and its application will be denied—a risk it would face in any event—while its existing licenses remain safely harbored. At best, the competition will drop out of the proceeding. From the standpoint of maximizing diversity of outlets, the consequences of the majority's approach could be especially profound where, as here, few other stations are licensed to the community in question.[12]

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[9] *Faulkner, supra*, 88 FCC 2d at 617.

[10] *Faulkner* underscored the Commission's particular concern with the conduct of majority stockholders and emphasized that Thorburn, the wrongdoer then had held less than 16 percent of the license's stock prior to departure. 88 FCC 2d at 617.

[11] *See Decision* at note 34.

In summary, the record in this case reveals a history of serious intentional wrongdoing by WIOO's majority stockholder, in the same community and during the time period under scrutiny. That stockholder retains his stockholdings and positions of authority within the licensee's operation and, indeed, is responsible for additional term-time misconduct in this case. The record is utterly devoid of rehabilitation evidence which might assure this Commission that WIOO's can not be trusted notwithstanding its past misdeeds. It does not even contain evidence bearing upon WIOO, Inc.'s term-time broadcast record, which is generally considered the best predictor of an incumbent licensee's future performance. In short, WIOO has failed to meet its statutory burden of showing that it possesses the basic qualifications to retain the license of this facility. Accordingly, its licensee renewal application should have been denied, and the Commission should have awarded this AM authorization to Carlisle Broadcast Associates. I dissent.

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[12] According to the 1983 *Broadcasting-Cablecasting Yearbook*, the only other radio stations licensed to Carlisle, Pennsylvania are an AM-FM combination with duplicated programming and a non-commercial station.

FCC 79D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WIOO, INC. Carlisle, Pennsylvania For Renewal of License	Docket No. 21506 File No. BR-4546
Gerald M. Fried, Theodore A. Fried, James P. O'Leary and Arthur M. Sherman d/b/a CARLISLE BROADCASTING ASSOCIATES Carlisle, Pennsylvania For Construction Permit	Docket No. 21507 File No. BP-19,978

Appearances

Samuel Miller and *Mark E. Fields* on behalf of WIOO, Inc.; *Lewis A. Rivlin* and *Michael W. Faber* on behalf of Carlisle Broadcasting Associates and *Kathleen Ann Phipps*, *Lunell Anderson* and *Charles E. Dziedzic* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE

LENORE G. EHRIG

(Issued July 3, 1979; Released July 9, 1979)

Preliminary Statement

1. By Memorandum Opinion and Order, released January 3, 1978, the Commission designated for hearing the mutually exclusive applications of WIOO, Inc., Carlisle, Pennsylvania for renewal of the license of station WIOO(AM) in Carlisle, Pennsylvania, and the application of Gerald M. Fried, Theodore A. Fried, James P. O'Leary and Arthur M. Sherman, d/b/a Carlisle Broadcasting Associates, for a permit to construct a new standard broadcast station on the frequency currently being used by WIOO. The following issues were specified:

> 1. To determine the effect of the misconduct established in the comparative FM proceeding . . . [*WIOO, Inc.*, 54 FCC 2d 692 (Rev. Bd. 1975); modified 56 FCC 2d 817 (Rev. Bd. 1975); review denied FCC 76-892, September 28, 1976.] on the basis and/or comparative qualifications of WIOO, Inc.
>
> 2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. By Memorandum Opinions and Orders released on March 14, 1978, the Presiding Judge added the following issues as to WIOO:

> To determine whether WIOO conducted its Community Leader Survey in accordance with the Commission's requirements, and to determine the effect of any deficiencies in WIOO's Community Leader Survey on its qualifications to be a Commission licensee.
>
> To determine whether WIOO misrepresented facts to the Commission in connection with its Community Leader Survey and, if so, to determine the effect of this conduct on WIOO's qualifications to be a Commission licensee. (FCC 78M-383)

and the following issue concerning Carlisle Broadcasting Associates:

> To determine the facts and circumstances surrounding the preparation and execution of amendments to Carlisle's application, filed on June 23, 1977 and July 14, 1977 and to determine, in light of the foregoing, the effect on Carlisle's comparative qualifications and whether Carlisle possesses the requisite qualifications to be a licensee. (FCC 78M-384)

3. A prehearing conference was held on March 15, 1978. Hearing sessions were held in Washington, D.C. on July 25 and 26, September 26, and December 1, 1978, at which time the record was closed. Proposed Findings of Fact and Conclusions were filed by all parties on March 14, 1979. Replies were filed on March 28.

Findings of Fact

WIOO, Inc.

4. The officers and shareholders of WIOO, Inc., which is the licensee of standard broadcast station WIOO in Carlisle, Pennsylvania, are as follows:

Name	*Office Held*	*% of Stock*
Harold Swidler	President General Manager	50%
Norman Swidler	Vice-President Treasurer	50%
William M. Gross	Secretary	0

Each of the officers is a corporate director. WIOO, Inc. has been the licensee of station WIOO since July 1965. The Swidlers, long-time residents of Carlisle, are active in community affairs. They are engaged in the full time operation of WIOO, and have no other media interests.

FM Proceeding Misconduct Issue

5. In designating this case for hearing, the Commission observed

that an earlier comparative proceeding involving applications by WIOO and the Cumberland Broadcasting Company for a new FM facility in Carlisle had resulted in WIOO's disqualification. See *WIOO, Inc.*, 54 FCC 2d 692 (Rev. Bd. 1975), modified, 56 FCC 2d 817 (Rev. Bd. 1975), *review denied*, FCC 76–892, 1976. In particular, WIOO was found to have knowingly violated the notarization requirements of the Commission's Rules by submitting false jurats and to have, on several occasions, gone well beyond the limits of permissible investigation of the competing applicant in an attempt to dissuade its competitor from prosecuting its application. The Commission held that WIOO's "cited improprieties constitute misrepresentation, abuse of Commission processes, and involvement in impermissible investigatory tactics." *Designation Order*, para. 3. The Commission stated further that the findings made in the FM proceeding were *res judicata* in this proceeding and that only an assessment of the impact of WIOO's misconduct as previously established by the Review Board on its qualifications here was necessary. *Designation Order*, para. 4.[1] Accordingly, the findings under this issue are adopted from the Review Board's decision disqualifying WIOO and denying its application for a new FM station in Carlisle, 54 FCC 2d 697–699 (re false jurats) and 703–708 (re investigatory tactics).

Community Leader and Misrepresentation Issues

6. Action on WIOO's 1972 renewal application was deferred (B.B. Ex. 7) pending resolution of the FM proceeding discussed in paragraph 5, *supra*. By letter of December 4, 1974, counsel for WIOO advised it of the necessity of conducting a community needs survey to submit as a supplement to its renewal application. Counsel enclosed a memorandum which contained survey examples and provided guidance on the methodology of the survey procedure (B.B. Exs. 8 and 5). When filed, WIOO's supplemental renewal application contained an exhibit in which it represented that a total of 81[2] community leaders were interviewed in February and March 1975; that all were conducted in person, face-to-face, and that the interviewers were Harold Swidler, President and General Manager; David Dillon, Program Director; Douglas Weary, News Director, and

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[1] In connection with its consideration of a Petition filed by WIOO seeking reconsideration and/or clarification of its Designation Order, the Commission recognized that, technically, the doctrine of collateral estoppel rather than *res judicata* applied to this proceeding with respect to the facts established in the FM proceeding. *Memorandum Opinion and Order* released April 24, 1978, (FCC 78–283).

[2] Actually, a simple addition of the various interview sheets reproduced in Carlisle Exhibits 1, 6 and 7 and WIOO Exhibit 7, shows that 83 community leaders were interviewed.

Richard Harris, Program Director through February 21, 1975. The interviewees were identified by name, age, sex, race and occupation and/or community affiliation (B.B. Ex. 4). The record in this proceeding contains 63 survey sheets signed by Harold Swidler as the interviewer (C.B.A. Ex. 1), 5 by Douglas Weary (C.B.A. Ex. 6), 4 by Richard Harris (C.B.A. Ex. 7), and 11 by David Dillon (WIOO Ex. 7). The community leader and misrepresentation issues with which the below findings of fact deal were added by the Presiding Judge as a result of a series of conflicting affidavits prepared by Messrs. Dillon, Harris and Swidler, as well as by certain of the interviewees, concerning the manner in which the community leader survey was conducted. The testimony and exhibits which make up this record reveal the following:

7. WIOO conducted its community leader interviews during the first three months of 1975. The licensee's survey efforts were directed by the station's general manager, Harold Swidler. As indicated, Mr. Swidler personally conducted 63 community leader consultations (Tr. 39, C.B.A. Ex. 1). He stated that his consistent procedure during the course of these interviews was first to explain the purpose of the interview and then to solicit community needs, problems and interests from the interviewee. Mr. Swidler next required the leader to complete a standard questionnaire (Tr. 44–45). Mr. Swidler believed it was required that the person being interviewed fill out the interview form. According to Mr. Swidler, he recalled instructing program directors David Dillon and Richard Harris, and news director, Doug Weary, to follow this same procedure. Mr. Swidler believed his instructions were clear and stated he could not recall that they had any questions (Tr. 56–57). According to Mr. Swidler, Messrs. Dillon, Harris and Weary volunteered to assist in the survey (Tr. 54, 76). He stated that he did not really rely on them because they were just young kids and he did most of the interviews himself. Nonetheless, in addition to oral instructions, Mr. Swidler testified that he made available to Messrs. Harris and Dillon a pamphlet provided by WIOO's Washington counsel which contained detailed instructions on the proper conduct of the survey. The pamphlet was maintained by his secretary. Indeed, Mr. Swidler recalled reading the following portion of the pamphlet to Mr. Harris and Mr. Dillon:

> 2. Conduct interviews in person, not by telephone. Interviews should be conducted in a formal manner (as interviews rather than casual conversations). The interview[er] should try to elicit from each community leader specific statements relating to community needs as seen by that leader (B.B. Ex. 5, p. 5; Tr. 82).

Mr. Swidler also recalled observing Messrs. Harris and Dillon while they looked at the pamphlet (Tr. 53–57, 83–85). However, he conceded that after completion of the interviews, he did not discuss the methodology followed by the interviewer or attempt to determine whether the interviews complied with his instructions. Mr. Swidler assumed that the interviews were conducted properly (Tr. 83–86).

8. Richard Harris was the WIOO program director from January 2, 1974 through February 1975 (Tr. 187). Contrary to Mr. Swidler's recollection, Mr. Harris believes that Mr. Swidler asked him to participate in the station's community leader survey (Tr. 210, 211). When asked if he could explain the circumstances surrounding Mr. Swidler's asking for his help, Mr. Harris stated that he was more than the average program director and got very much involved in a lot of different operations of the station. To program a station, he felt it was necessary to be in touch with the community, "and there was no better way to be in touch with the community than to do interviews. I was willing to do it, and Harold saw it as part of my responsibilities, I am sure" (Tr. 211). That the matter of whether Mr. Harris was drafted or volunteered for this task is not entirely black or white becomes evident from the following question and answer which concluded the foregoing colloquy (Tr. 211):

> Q. [Bureau Counsel] You didn't bring it [the survey] up to him, he brought it up to you?
>
> A. [By Mr. Harris] *Not that I recall. I think* he brought it up to me. *I don't think* this is something Mr. Swidler would have gone out and done totally on his own [Emphasis added].

9. Mr. Harris was originally to perform about 50 percent of the community leader consultations. However, since he resigned from the station before the survey was completed, he only recalled conducting three interviews. To determine the proper method of conducting the survey, Mr. Harris had contacted Eric Bernthal, WIOO's Washington counsel, by telephone. Mr. Harris knew Mr. Bernthal as a result of previous consultations with him concerning various contests run by WIOO. Mr. Bernthal instructed Mr. Harris that the community leader interviews were to be conducted in person. Mr. Bernthal had requested Mr. Swidler to conduct about 50 percent of the interviews in order to demonstrate his involvement in the survey (Tr. 187–191). Mr. Harris spoke with Mr. Bernthal several times concerning the survey (Tr. 212). According to Mr. Harris, he then instructed Mr. Swidler in the proper interview methodology. Mr. Harris stated that he didn't recall Mr. Swidler's instructing him how to conduct the survey or asking him to read any written material. He did recall, however, that memos were received from the attorneys and community leader forms were supplied (Tr. 189). According to Mr. Harris, all of the instruction he received was from Rick Bernthal and Mr. Swidler never exercised any supervision or control over Mr. Harris' conduct of the community leader interviews (Tr. 214). Mr. Harris did recall Mr. Swidler's stating that he (Mr. Swidler) was going to drop off a few questionnaires with friends.

Although Mr. Harris did not recall any forms being returned to the office by mail, he did recall having seen forms filled out in different colors of ink (Tr. 217).

10. As a result of his discussions with Mr. Bernthal, Mr. Harris understood that the survey was to be a personal interview and that the interviewer was to solicit community needs and problems from the leader. During the interviews he conducted, Mr. Harris took notes on the needs and problems and provided the form to the leader to sign following the interview. According to Mr. Harris, the interview forms were to be signed by the leader in light of Mr. Bernthal's concern that if there should ever be any questions raised, the interviewee's signature would be there. Mr. Harris imparted his understanding of the proper interview procedure to Mr. Weary (Tr. 190–192).

11. In February 1975, Mr. Harris was replaced as the WIOO program director by David Dillon. David Dillon is the professional name used by David Gehry (Tr. 126). According to Mr. Dillon, some time in February or March 1975, Mr. Swidler solicited his assistance in conducting WIOO's community leader survey. Mr. Dillon had no previous experience as a program director. He assumed that assisting in the station's survey efforts was part of his job (Tr. 126–129). Mr. Dillon's participation began when he received a telephone call from Mr. Swidler who informed him that it was important to complete the survey promptly. Messrs. Dillon and Swidler met and started immediately. According to Mr. Dillon, Mr. Swidler never showed him any survey instructional material provided by Washington counsel (Tr. 158). However, utilizing a list of names provided by Mr. Swidler, Messrs. Dillon and Swidler telephoned the persons on the list and informed them that they were considered community leaders. The community leader was then asked to assist the station in ascertaining the problems within the community. The leaders were advised that all they would be required to do was fill out a form that would be delivered that night. Each person contacted was given the option of either mailing the form to the station or having it picked up at home (Tr. 129–130).

11. Following the telephone calls, Messrs. Swidler and Dillon drove to the homes of the persons who had been contacted. In each instance, Mr. Dillon went to the door. His conversation with the person answering the door was limited to instructions for returning the form to the station. Often the person answering the door was not the community leader contacted by telephone. Nevertheless, the forms were still left with whomever answered (Tr. 129–130).

12. According to Mr. Dillon, approximately ten interview sheets were distributed that night (Tr. 131). Mr. Dillon does not know whether any of these sheets were returned to the station (Tr. 169). He distributed from two to six additional interview sheets within the next day or two. Some of these sheets were filled out in his presence

and returned to him immediately. Mr. Dillon did not "interview" these persons. He merely answered questions concerning the proper way to complete the forms (Tr. 137–138). Mr. Dillon stated that he never actually interviewed anyone (Tr. 136). He did not sign any of the forms before handing them out. However, he did sign a number of forms that had apparently been returned to the station by community leaders. For example, during the course of the survey, a stack of forms was generally on the secretary's desk. If the forms lacked an interviewer's signature, he would sign the form as the interviewer (Tr. 138–139). Mr. Dillon signed 11 forms in this fashion (Tr. 141). Similarly, if a form lacked a specified time of interview, he provided the time. According to Mr. Dillon, he was just following instructions to complete the forms. However, he was not specifically instructed to provide incorrect times. According to Mr. Dillon, the fact that certain of the interview forms had no times inserted was merely a mistake on his part (Tr. 150, 151). Mr. Dillon could not identify the persons to whom he delivered forms (Tr. 134). However, as indicated, 11 WIOO interview forms bear his signature (WIOO Ex. 7). Mr. Dillon left WIOO on friendly terms with Mr. Swidler (Tr. 157).

13. Mr. Swidler could not recall that any evening telephone calls had been made in concert with Mr. Dillon and also denied driving anywhere in his car with Mr. Dillon in connection with the ascertainment effort (Tr. 57, 64, 77). He further could not recall that any interview sheets were brought to WIOO by the interviewees (Tr. 66). He testified that he compiled the list of problems and needs of the Carlisle area from the completed survey sheets (Tr. 79–80). He placed no particular importance on the interviews conducted by persons other than himself because he felt that the number that he had done was all he had been advised by counsel was necessary (Tr. 86).

14. Eric L. Bernthal, mentioned above, represented WIOO from 1973 through 1976. During the preparation of WIOO's 1975 renewal application, Mr. Bernthal testified that he communicated with WIOO several times. According to his records, by a letter dated December 4, 1974, Mr. Bernthal provided Mr. Swidler with detailed instructions for the proper conduct of the ascertainment survey (Tr. 280–283; B.B. Exs. 5, 8). Mr. Bernthal's records also indicate a December 16 telephone conversation with Mr. Swidler concerning the renewal application and a December 20, 1974 telephone conversation with Mr. Harris concerning the survey. In addition, Mr. Bernthal's notes show a March 6, 1975 telephone conversation with Harold Swidler concerning the renewal application. Mr. Bernthal has no independent recollection of either the Harris or Swidler conversations (Tr. 283, 290).

Community Leader Testimony

15. As indicated above, WIOO Exhibit 7 contains 11 Community

Needs Survey Interview Reports which bear the signature of Dave Dillon as the interviewer even though Mr. Dillon testified and signed affidavits to the effect that he conducted no "real" interviews. By way of rebuttal, WIOO produced all of those persons interviewed whom it was able to locate.

16. Harry A. Herb, a Carlisle resident, was president of the Cumb Fire Company and a member of the International Management Council at the time the WIOO community needs interview report was filled out (WIOO Ex. 7, p. 4). Mr. Herb testified that he had no recollection of receiving the form or filling it out. Nonetheless, Mr. Herb identified the handwriting on the form as being his own. He had previously signed an affidavit to the effect that he was certain that he was never the subject of a face-to-face interview in connection with the form (Tr. 335, 338–344). At the hearing, he testified that he was not certain but the only time he could now remember signing anything was when WIOO was doing a radio telethon at the fire house back in the early part of 1975 (Tr. 340). It is noted that his interview sheet bears the date of March 18, 1975.

17. Mary P. Sandels was president of the League of Women Voters and a member of the Carlisle Housing Board and Carlisle Opportunities Homes (WIOO Ex. 7, p. 5). Ms. Sandels did not recall the name of the WIOO representative who provided her with the form. However, she remembered that the interviewer was a young man and that the interview encompassed approximately 30 minutes. Although she personally filled out the form, the interviewer did ask her what were the needs, problems and interests of the community (Tr. 349, 351, 357, 359).

18. Florence A. Miller was president of React and a member of the Eastern Star at the time of her contact with WIOO (WIOO Ex. 7, p. 6). Although Ms. Miller had no recollection of the circumstances of the interview form's completion, she stated that the form was definitely completed in her handwriting (Tr. 365–67, 370, 371, 376). Mr. Dillon recalled providing the form to Ms. Miller and that he was with Ms. Miller for approximately 15 minutes during which time she completed the form. However, Mr. Dillon denied having "interviewed" her (Tr. 152).

19. The interview report form for Jim DuCharme indicates that he was a student involved in the student affairs committee, Key Club and Protestant Youth of the Chapel (WIOO Ex. 7, p. 7). Mr. DuCharme and a group of other high school students were asked by a WIOO representative to fill out the survey form in the school cafeteria. After the students completed the form, a brief but more in depth discussion took place concerning the problems listed on the form as well as anything else the students wanted to add (Tr. 320–333). The whole process took about 15 minutes (Tr. 321).

20. William S. Weller was visited by Mr. Dillon on March 25, 1975, so that Mr. Weller could fill out a form for WIOO as part of its

licensing procedure (Tr. 440). At the time of the interview, Mr. Weller was an advisor to the Order of DeMolay, and adult coordinator for the Capital Area Youth Forum which involved 32 high schools in the Central Pennsylvania area. He was also a teacher in Mechanicsburg (Tr. 439; WIOO Ex. 7, p. 10). During the course of Mr. Dillon's visit, Mr. Weller completed the form and asked several questions of a clarifying nature. Mr. Dillon did not direct questions to Mr. Weller but merely answered Mr. Weller's inquiries (Tr. 442, 443). Mr. Weller did not consider this to constitute a real interview (C.B.A. Ex. 10) because Mr. Dillon did not follow-up Mr. Weller's answers by asking for more details (Tr. 441–442).

21. William H. Miller was president of the Carlisle Fish and Game Association at the time he completed the WIOO interview report (Tr. 384). Although Mr. Miller recognized his handwriting and signature on the completed form, he had no recollection of the circumstances surrounding its signing or completion (Tr. 378, 380). He stated, however, that the Fish and Game Association had 1700 members. As President, "I had quite a few people who would call me about different things and get my opinion on it . . . in an organization like that, you had all kinds of calls relating to all kind of community problems" (Tr. 384). Mr. Miller believed his interview would have been conducted at the same time as his wife's (see paragraph 18, *supra*).

22. Robert L. Matalonis signed three affidavits concerning his alleged interview stating first that he had not been interviewed, then that he had been interviewed, and finally that he could not recall anything regarding an interview (Tr. 395–400, 405–406, 409–444). The WIOO interview form signed by Mr. Matalonis indicates that he was interviewed on March 26, 1975 (C.B.A. Ex. 1, p. 3). Mr. Matalonis has no independent recollection of the incidents surrounding the completion of this form (Tr. 389). However, the form was completed in his handwriting (Tr. 387). According to Mr. Swidler, he was present at Mr. Matalonis' house for approximately 30 minutes for purposes of the interview (Tr. 46). Mr. Matalonis did testify that, due to chemotherapy he was receiving in 1975, he would not necessarily recall an interview if one had occurred on the date given on the report (Tr. 394–395).

23. The WIOO interview form for Delores Sunday is dated March 18, 1975 and was completed and signed by Mrs. Sunday (C.B.A. Ex. 1, p. 56). Mr. Swidler also signed this form. Mrs. Sunday recalls having been interviewed at home by Mr. Swidler. She has never filled out any other interview form for WIOO. Further, Mrs. Sunday stated she had never met David Dillon (Tr. 228) even though Mr. Dillon believed that he dropped off the Sunday interview sheet and had waited for Mrs. Sunday to sign the form. At footnote 18 to paragraph 51 of its Proposed Findings, Carlisle Broadcasting Associates speculates that Mr. Dillon may have confused the names of Mrs. Creeden

Sunday and Mrs. Creigh Snyder (Tr. 239) and, therefore, may have mistakenly identified Mrs. Sunday as a person to whom he delivered a Report Form (Tr. 153).

Carlisle Broadcasting Associates

24. Carlisle Broadcasting Associates is a partnership composed of four individuals with the following ownership percentages: Gerald M. Fried, James P. O'Leary, and Theodore A. Fried, each 30%, and Arthur M. Sherman, 10% (official notice taken). With the exception of Mr. O'Leary, who resides in Mechanicsburg, approximately 10 miles from Carlisle, each partner resides in Harrisburg, approximately 18 miles from Carlisle. Mr. O'Leary has been employed in various capacities in broadcast stations, primarily in Pennsylvania. His present business interests are president, director and 50% owner of O'Leary and Associates, Inc., an advertising, marketing and public relations company to which he provides day-to-day management; officer and 50% owner of Media Marketing Associates, Inc.; 50% partner of Media Marketing Associates, and 100% owner of Sound Associates. He has not lived in Carlisle itself, operated any business there, or been active in any Carlisle-based community activity. Gerald Fried is the other 50% owner of O'Leary & Associates, Inc. and Media Marketing Associates. He also has real estate interests as well as a 50% interest in a furniture company. He has never lived in Carlisle or been active in any of its community based activities. Theodore A. Fried is the father of Gerald Fried and is associated with him in the real estate and furniture business. Arthur Sherman worked in broadcasting for about 23 years. Since 1971, he has been employed by the State of Pennsylvania primarily in the public relations field.

25. Mr. O'Leary proposes to devote substantially full time to the proposed station and has made arrangements with respect to his other business activities so as to be able to devote such time. Gerald Fried proposes to devote part-time to the business and public service aspects of the station. Neither Theodore Fried nor Arthur Sherman proposes to devote any appreciable time to the operation of the station.

The Carlisle Amendments Issue

26. On June 2, 1977, Gerald Fried visited Carlisle's communications counsel in Washington and delivered two community leader interview forms (Tr. 105, 106). While in his counsel's office, Mr. Fried discussed the "slowness that the land owners had shown in the past to provide documentation" for Carlisle's transmitter site lease option (Tr. 99). Mr. Fried was particularly concerned since, by a letter dated May 25, 1977, the Commission had given Carlisle 30 days within which to provide a current option (Tr. 107). To expedite matters, counsel asked Mr. Fried to execute two affidavits for purposes of

anticipated amendments (Tr. 99). At the time Mr. Fried executed the affidavits, he did not possess all of the documents he intended to enclose in the amendments. However, he had discussed an extension of the lease with George L. Ebener, the real estate agent who represented the owner of the proposed site. It was Mr. Fried's understanding at the time he executed the affidavits that the lease option would be extended and that documentation to that effect was forthcoming (Tr. 116–120). According to Mr. Fried, Mr. Ebener had advised him that certain of the co-owners of the site were out of town and unavailable to sign a new option. However, Mr. Ebener indicated further that the owners were inclined to agree to a new option (Tr. 116–120). By a letter dated June 16, 1977, Mr. Ebener notified Mr. Fried that his clients would be glad to prepare a new lease option (WIOO Ex. 6, p. 4). Under cover of a letter dated June 23, 1977, Carlisle amended its application to include, *inter alia*, Mr. Ebener's June 16 letter (WIOO Ex. 6, p. 4). Attesting to the accuracy of the amendment and the fact that Mr. Fried had read the amendment's contents was one of the affidavits executed on June 2, 1977 (WIOO Ex. 6, p. 6). Similarly, under cover of a letter dated July 14, 1977, Carlisle provided the anticipated real estate option in the form of an amendment. The option agreement was dated July 7, 1977 and specified a duration of one year (WIOO Ex. 6, pp. 8, 9). Submitted with the option was the second June 2, 1977 affidavit which attested to the amendment's accuracy and attested that Mr. Fried had read the amendment's contents (WIOO Ex. 6, p. 10).

27. According to Mr. Fried, the premature execution of both affidavits was the idea of Mr. Fried's attorney (Tr. 99). Counsel was concerned that because of potential delays in the mail, the new lease option would be late (Tr. 99, 111). Mr. Fried believed that his counsel understood the Ebener letter and the new lease option to have been in existence on June 2, 1977 (Tr. 99, 110, 111). Mr. Fried signed the affidavit "because you [counsel] said to . . ." (Tr. 99). In Mr. Fried's view, however, the contents of the amendment were correct (Tr. 100). At the time Mr. Fried signed the affidavit, it did not occur to him that the procedure was improper (Tr. 103, 104).

Conclusions

1. *The Effect on the Grant of the Current WIOO AM Renewal Application of WIOO's Misconduct as Established in the Prior FM Proceeding.* At paragraph 3 of its designation order, the Commission discussed the comparative FM proceeding between the Cumberland Broadcasting Company and WIOO,[3] indicating:

> ". . . That earlier comparative proceeding, evaluating two applications for an FM facility at Carlisle, resulted in the disqualification of WIOO, Inc. on grounds

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[3] Initial Decision, *WIOO, Inc.*, 54 FCC 2d 712 (1974), Review Board Decision, *WIOO, Inc.*, 54 FCC 2d 692 (1975).

> it had: (a) knowingly violated the notarization requirements of Commission rules by submitting false jurats; and (b) had on several occasions gone well beyond the limits of permissible investigation of the competing applicant, Cumberland, in an attempt to dissuade its competitor from prosecuting its application. The Review Board concluded that the knowing and repeated violation of notarization rules in the belief that the end (raising certain matters before the administrative law judge) justifies the means is an unacceptable attitude for a Commission licensee. Similarly, the Board concluded that attempts by WIOO principals to (i) buy its competitor's transmitter site, (ii) undermine the competitor's financial qualifications through implied threats directed against witnesses, and (iii) influence a bank appraisal of competitor's property by itself applying for a mortgage on it, were adequate in combination to disqualify WIOO, Inc. in that FM proceeding. The cited improprieties constitute misrepresentation, abuse of Commission processes, and involvement in impermissible investigatory tactics. Accordingly, a substantial and material question of fact exists as to whether WIOO, Inc. possesses the qualifications to remain a licensee of this Commission.
>
> "We view the factual findings relating to licensee's qualifications in the FM proceeding as *res judicata* in regard to the captioned AM facility. As the Review Board decisions in the FM comparative hearing established the factual circumstances involved in these matters, only an assessment of the impact of WIOO's misconduct on its qualifications remains for the hearing authorized by the instant Order. Our specification of the standard comparative issue, *infra*, should not be interpreted as suggesting the outcome of this assessment."

As directed by the Commission, the "doctrine of collateral estoppel"[4] was applied by the Presiding Judge to the facts established in the comparative proceeding between WIOO and Cumberland Broadcasting Company.

2. In its Proposed Findings under this issue, WIOO argues that the Presiding Judge erred in not receiving into evidence its Exhibits 3, 4 and 5 which had been offered for the purpose of rebutting the Review Board's findings of misconduct in the FM proceeding. WIOO's position is that the Commission did not intend that it be estopped from showing other facts not inconsistent with the facts found by the Review Board. Accordingly, it proposes findings based upon its rejected exhibits. The short answer to WIOO's argument is that although following the issuance of this Initial Decision, WIOO may file exceptions to any evidentiary rulings made by the Presiding Judge, it is clearly precluded from proposing findings based on excluded evidence. Moreover, WIOO's suggestion that the designation order permits the showing of other facts not inconsistent with the facts found in the FM proceeding is simply wrong. The above-quoted portion of the Commission's designation order makes it entirely clear that (1) the facts involved in the FM proceeding have been established and (2) that only the impact of those facts on WIOO's qualifications to continue as a Commission licensee remains to be determined.

3. In regard to the matter of impact, both Carlisle Broadcasting Associates and the Broadcast Bureau maintain that the findings in

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[4] See Footnote 1, *supra*.

the FM proceeding require a denial of WIOO's renewal application in light of the fact that Mr. Swidler's misconduct, established in the FM proceeding, took place while WIOO was the licensee of the AM facility for which it now seeks a license renewal and, therefore, that such misconduct cannot be rewarded by renewal of license. In response to the position espoused by the Bureau and Carlisle, WIOO argues that the former have simply failed to draw independent conclusions in this case as directed by the Commission and are merely adopting the conclusions reached by the Review Board.

4. Renewal of a broadcast license requires a finding that the applicant has operated and will continue to operate in the public interest. It must be borne in mind here that the established misconduct concerned an FM application. The Commission at no point has found any improprieties in the continuous operation of AM Station WIOO since 1965 by Harold and Norman Swidler. In the Presiding Judge's view, the facts established in the FM proceeding for which WIOO has already been severely penalized by virtue of the denial of its FM application, require only that WIOO be assessed a comparative demerit under the past broadcast record criterion rather than a determination, as urged by Carlisle and the Bureau, that it lacks the basic qualifications to be a Commission licensee. See *KBLI, Inc.*, 16 FCC 2d 809 (Review Board 1969); *Azalea Corp.*, 11 FCC 2d 86 (Review Board 1967). See also *Tipton County Broadcasters*, 37 FCC 191 (1964).

Community Leader and Misrepresentation Issues

5. Two issues were specified by the Presiding Judge pertaining to the conduct of WIOO's community leader survey. Both were occasioned by conflicting affidavits with respect to the manner in which the community leaders were interviewed. It was alleged, and denied, that no personal interviews took place and that the community leader survey was compiled by written questionnaire. Furthermore, one community leader submitted conflicting affidavits as to whether he was interviewed at all. Accordingly, the Presiding Judge ruled that these contrary statements required resolution in hearing. Issues were designated to determine whether WIOO's survey complied with the Commission's *Primer*,[5] and whether WIOO had misrepresented facts to the Commission with respect to such survey.

6. Based upon the findings contained in paragraphs 6 through 23, *supra*, it is concluded that WIOO's community leader interviews are in compliance with the *Primer*. Harold Swidler, WIOO's general manager and 50 per cent owner, conducted 63 of WIOO's 83 community leader consultations. No witness contradicted Mr. Swidler's testimony that he actually held face-to-face interviews, and the

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[5] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

testimony of Delores Sunday supports Mr. Swidler's in that she recalls being interviewed by him and not merely completing a form. In the Presiding Judge's view, the conflicting affidavits submitted by Robert Matalonis can play no material role in this proceeding. Although Mr. Matalonis was apparently interviewed by Mr. Swidler, Mr. Matalonis clearly has no recollection of the incident. The findings indicate, however, that a health problem may explain his faulty memory. Additionally, the fact that Mr. Swidler caused the interviewees to complete the interview forms in their own handwriting is also of no material significance, since the Commission does not prohibit such a procedure.

7. The balance of the community leader surveys was conducted by Richard Harris, the station's program director from January 2, 1974 through February 1975; David Dillon, Harris' successor at WIOO, and Doug Weary, the WIOO news director. Specifically, the findings show that four WIOO community leader interview reports bear Mr. Harris' signature, five bear Mr. Weary's signature, and 11, Mr. Dillon's. There is no dispute concerning the fact that Mr. Harris' interviews were face-to-face meetings in which he solicited community needs, problems and interests. The findings show that Mr. Harris instructed Mr. Weary to follow the same procedure. Mr. Weary neither testified nor did anyone with personal knowledge of his actual interviews testify. Accordingly, the findings will only support the conclusion that the five Weary interviews also comply with the *Primer*. Mr. Dillon's interviews, on the other hand, cannot be relied upon since the evidence compels the conclusion that he conducted no "real" personal interviews during the course of his survey efforts and certainly none which represent the meaningful dialogue contemplated by the *Primer*. The deficiencies of these 11 Dillon interviews do not, however, invalidate WIOO's survey. *Julie P. Miner*, 60 FCC 2d 892 (Rev. Bd., 1976).

8. In regard to the misrepresentation issue, there are actually only three areas of difference between the testimony of Harold Swidler, on the one hand, and Messrs. Harris and Dillon on the other. These concern whether the latter volunteered their services or were asked by Mr. Swidler to assist him in the community leader survey; whether or not Harold Swidler lied when he testified that he instructed Mr. Harris and Mr. Dillon in the proper survey methodology; and finally, Mr. Swidler disputes Mr. Dillon's testimony concerning the evening car ride during which Mr. Swidler allegedly drove David Dillon, his new program director, to various homes in the community to distribute questionnaires. In regard to the latter, it is noted at the outset that Mr. Dillon did not know whether any of the questionnaires he allegedly distributed were ever returned to the station or submitted to the Commission as part of the WIOO community leader survey. The Bureau and Carlisle Broadcasting reach the conclusion that it was Mr. Swidler who lied since the

record is devoid of any evidence of bias or prejudice which would reduce the credibility of the Harris-Dillon testimony whereas Mr. Swidler obviously has a significant financial stake in the proceeding.

9. The Presiding Judge is fully aware of the fundamental importance of truthfulness and complete candor on the part of the Commission's licensees in their dealings with the Commission. *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243 (1972), review denied 39 FCC 2d 1099 (1973); *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). In the Presiding Judge's view, however, the evidence here is not clear cut that anyone has intentionally lied. Mr. Swidler was a sincere and candid witness. The community leader interviews in question were conducted in 1975, more than four years ago. At that time, Richard Harris was approximately 19 years of age (Tr. 186) and in the process of leaving the station. Mr. Dillon was approximately 22 years of age and a new station employee. In all, Mr. Dillon was only employed by WIOO for a period of approximately five months in 1975 (Tr. 125–127). It is, indeed, perfectly conceivable that the events in question were not emblazoned upon Mr. Swidler's memory because, in his own words, he did not really rely upon the interviews conducted by these young men, because they were "just kids." As the Commission recently recognized in adopting *Revised Procedures for the Processing of Contested Broadcast Applications*, General Docket No. 79–137, FCC 79–331 (June 1, 1979), ascertainment showings have become the source of much nitpicking in competitive multi-party cases, even though matters of decisional significance are not at issue. Here, as indicated above, WIOO's survey has been found to be in compliance with the Commission's *Primer*. In regard to the alleged misrepresentations, just as the Bureau states there was no reason for Messrs. Harris and Dillon to have lied, none can be found to support the conclusion that Mr. Swidler lied. To the contrary, the findings do not preclude the conclusion, which is hereby made, that the memories of all parties have become dimmed over the years and that the flat statements in the affidavits which caused the addition of these issues were not as black or as white as originally painted. That Mr. Dillon's memory was not absolute becomes clear from a review of his testimony which contains instances of retractions and modifications, and which, in certain respects, was actually refuted by other witnesses.

10. The most that can be concluded under these issues is that Mr. Swidler should have made a greater effort to supervise the conduct of these young men, particularly Mr. Dillon. The fact that he did not rely on their work is no excuse since he did, even though unnecessarily in light of the quantity and validity of his own survey efforts, submit to the Commission their work product. Thus, it is concluded that even though the record does not support a disqualification for alleged misrepresentation, WIOO is assessed a slight

comparative demerit for Mr. Swidler's being derelict in his responsibility to supervise the very limited survey efforts of his assistants.

The Matter of the Carlisle Amendments

11. This issue was designated to determine the facts and circumstances surrounding the preparation and execution of two separate amendments to Carlisle's application filed on June 23, and July 14, 1977. Both amendments contained documents bearing dates subsequent to the dates on the covering affidavits whose purpose was to attest to the accuracy of each amendment and to the fact that the contents of each amendment had been read by Gerald Fried, a Carlisle partner and 30 percent owner.

12. As indicated in the above findings, Mr. Fried had visited Carlisle's communications counsel on June 2, 1977 for the purpose of providing him with two community leader forms. While there, and at his counsel's request,[6] Mr. Fried executed two affidavits to be used in connection with amendments to be filed subsequently. Both affidavits were dated June 2, 1977 and declared that Gerald Fried had read the amendments and that their contents were true and correct. The findings demonstrate and it is concluded that the contents of the amendments did not exist at the time of Mr. Fried's attestation. Carlisle subsequently filed June 23 and July 14, 1977 amendments utilizing these June 2 affidavits. The amendments contained, respectively, a June 16, 1977 letter from a real estate agent indicating that Carlisle's proposed transmitter site lease option would be extended, and an agreement, dated July 7, 1977, which did extend the applicant's option. Obviously, Mr. Fried could not, on June 2, have read the June 16 letter or the July 7 option agreement. There is, however, no evidence in the record which would indicate that the contents of the amendments were inaccurate when filed.

13. Based upon the findings, it is concluded that there was no intention to mislead the Commission by these filings. Accordingly, it

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[6] The Broadcast Bureau has filed a Motion to Strike paragraphs 6, 7, and 8 of Carlisle Broadcasting's Reply Findings on the ground that the entire thrust of these paragraphs pertains to the state of mind of Carlisle's counsel in connection with this matter. The Bureau argues that counsel did not testify and that there is no probative evidence, documentary or otherwise, supporting Carlisle's various statements as to what counsel thought. Carlisle opposes the Bureau's motion contending that the uncontradicted testimony of Gerald Fried supports the disputed paragraphs and that it is entirely illogical to assume the contrary. The Bureau's Motion will be granted. Not only is the record devoid of testimony by Carlisle's counsel, but had counsel been called to testify, he and his firm would have been obligated to withdraw from further participation in this proceeding. See *Code of Professional Responsibility*, American Bar Association Disciplinary Rules 5–101, 5–102 and Ethical Considerations 5–9, 5–10; See also *New York Cent. & H.R.R. Co.* v. *Henney*, 207 F. 78 (2nd Cir. 1913); *United Parts Mfg. Co.* v. *Lee Motor Products, Inc.*, 266 F.2d 20 (6th Cir. 1959); *United States* v. *Maloney*, 241 F.Supp. 49 (W.D. Pa., 1965); and *Sears, Roebuck & Co.* v. *American Plumbing and Supply Co.*, 19 F.R.D. 329 (E.D. Wisc., 1954).

is concluded that the evidence under this issue does not warrant Carlisle's disqualification. The evidence does, however, warrant the imposition of a comparative demerit. Mr. Fried's attestation to the accuracy of documents which did not then exist cannot be condoned. His explanation that execution of these affidavits was his counsel's idea must also be rejected. Administration of the Commission's Rules requires that applicants and licensees must be held accountable for their own conduct. *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 688 (1969). See also *Belo Broadcasting Corporation (WFAA-TV)*, 68 FCC 2d 1479, 1486 (1978); *James C. Sliger*, 70 FCC 2d 1565, 1572 (1979).

14. Restated, although it is concluded that Carlisle's careless and inattentive filing of amendments reflects adversely on its qualifications to become a Commission licensee, the record does not support a conclusion that Carlisle engaged in a deliberate attempt to deceive the Commission. Accordingly, a comparative demerit is assessed against Carlisle.

The Comparative Issue

15. Having found that both applicants possess the basic qualifications to be a broadcast licensee, it is necessary to determine which of them would, on a comparative basis, better serve the public interest. This comparative evaluation involves a choice between WIOO, a renewal applicant which has been operating its station in Carlisle, Pennsylvania since 1965, and Carlisle Broadcasting Associates, an applicant for a construction permit seeking to operate on these identical facilities. The Communications Act of 1934, as amended, and court precedent require that a full comparative evaluation be made between these mutually exclusive applicants. *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945); *Citizens Communications Center* v. *F.C.C.*, 447 F.2d 1201 (D.C. Cir. 1971), clarification granted, 463 F.2d 822 (D.C. Cir. 1972); *Central Florida Enterprises, Inc.* v. *F.C.C.*, __ F.2d __ (D.C. Cir. September 25, 1978), rehearing denied, January 12, 1979. However, the full hearing requirement of the cited cases does not mean that precisely the same considerations which apply to comparative proceedings between mutually exclusive permit applicants must govern a comparative renewal proceeding such as is the case here. Both *Ashbacker, supra* at 332, and *Citizens Communications Center* at 1213 recognize the greater burden faced by a challenger seeking to displace a licensee. While the Commission's policy with respect to renewal comparative proceedings has undergone some evolution over the years, the general position has been to attach considerable significance to the incumbent's past performance achieved under the pressures and demands of day-to-day operation in the community. Formulation of *Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419, 429–430

(1977), affirmed *sub nom. National Black Media Coalition* , v. *F.C.C.*, 589 F.2d 578 (D.C. Cir. 1978). While acknowledging "the inadequacies of the mechanism for comparing the incumbent licensee and the new applicant," the Commission has made clear that, until Congress acts in this area, it will consider each renewal comparative hearing on an *ad hoc* basis in accordance with the general criteria set forth in its *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Commission has emphasized that the weight to be accorded the legitimate renewal expectancy of the incumbent licensee and the significance of the other comparative factors will depend on the facts of each particular case. In denying rehearing in the *Central Florida* case, *supra*, the Court held that the weight to be given findings under the various criteria in renewal proceedings is dependent upon the facts of the particular case.

16. In its *Policy Statement on Comparative Broadcast Hearings*, the Commission set forth two objectives to be accomplished by the comparative evaluation process: namely, to obtain the best practicable service to the public and the diffusion of mass media control. Balancing the various comparative factors and ordering their priority are matters committed to the Commission's discretion. In *F.C.C.* v. *National Communications Committee for Broadcasting*, 98 S.Ct. 2096, 43 R.R. 2d 152 (1978), the Supreme Court reaffirmed this principle when it stated that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance," 43 RR 2d, at 177.

17. As to the objective of achieving a diffusion of control of the mass media neither applicant here has any other interests in media of mass communications. Thus, neither is entitled to a preference under this criterion.

18. Effectuation of the best practicable service to the public objective entails the appraisal of the proposed participation by the principals of the applicants in the operation of the proposed facility; an evaluation of their past broadcast experience and their community activities; the most efficient use of the frequency; and where, as here, a renewal applicant is involved, the past record of the station during the license period.

19. Turning first to the matter of integration, it is noted that Harold and Norman Swidler each own 50% of WIOO, Inc. WIOO Exhibit 1 states that the Swidlers are engaged in the full time operation of WIOO, that Harold Swidler is President and Norman is Vice-President and Treasurer, and that each is a director. Harold Swidler testified that he is the station's full time general manager.[7]

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[7] Norman Swidler was not called as a witness in this proceeding and there is no evidence as to the actual amount of time he devotes to the station on a day-to-day basis. In Exhibit 7 of WIOO's renewal application (File No. BR-4546) having to do with the staff of Station WIOO, both Harold and Norman Swidler are listed under the heading "Administrative." Looking back to the 1973–74 FM proceeding, it is

The vagueness of the record on the matter of the actual day-to-day participation of Norman Swidler requires that WIOO be credited with full time integration of Harold Swidler, its general manager and 50% owner, and partial integration of Norman Swidler, the remaining 50% owner. In contrast, Carlisle Broadcasting Associates proposes full time integration of James P. O'Leary, only a 30% partner, and part time integration in no specified amount by Gerald Fried, another 30% partner. The significance of the integration of the Swidlers is enhanced by the fact that both partners are long time residents of Carlisle and active in community affairs. No Carlisle Broadcasting principal lives in Carlisle and none of them has been involved in Carlisle based community activities. Further, the only Carlisle Broadcasting principal who has had any broadcasting experience is Mr. O'Leary. Although he has been employed in various capacities in broadcast stations, he has never served in a management capacity. The Swidlers, on the other hand, have been involved in the operation of WIOO in Carlisle, Pennsylvania, since 1965. Based upon the foregoing, it is concluded that WIOO is entitled to a significant and substantial preference in the area of integration of ownership into management.

20. Turning next to the matter of efficient use of the frequency, the Commission's *Policy Statement* provides that this factor is to be considered only where the facts warrant. They do not so warrant here.

21. The remaining factor to be considered is the broadcast record of WIOO during the license period. The Presiding Judge is aware that the fact of incumbency without more is legally irrelevant under the statute. Past performance is, however, some evidence of what future performance is likely to be. The problem here is that the record is devoid of any programming evidence at all. Thus, renewal expectancy cannot be placed on the decisional scale. It is noted, however, that WIOO has been operated by the Swidlers since 1965. The fact that no issues have been included derogating the programming or technical operation of WIOO during this lengthy period must count as at least a thumb on the scale.

22. The ultimate conclusion must now be addressed as to which of these mutually exclusive proposals would better serve the public interest. Although Carlisle has been deemed to possess the basic qualifications to be a Commission licensee, its careless and inattentive filing of amendments has earned for it a significant comparative demerit. As to WIOO, while two comparative demerits have been

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noted that the Presiding Judge there found that "Norman Swidler consults continuously with Harold Swidler on matters relating to the day-to-day operation of Station WIOO. He assists in the soliciting and servicing of local area accounts and also contacts public service organizations for spot announcements and programs on their behalf. Approximately 2 to 3 hours per day are involved in these matters." *WIOO, Inc.*, 54 FCC 2d 712, 743–744.

assessed against it, these must be weighed against its substantial and decisionally significant preference under the integration criterion, and the fact that there is no evidence in this record which derogates its past programming efforts or technical operation. The comparative demerit stemming from the denial of WIOO's FM application has no bearing on WIOO's operation and the question of whether Mr. Swidler sought the help of two young employees or they volunteered their assistance, whether he instructed them in the method of conducting a community leader survey, and whether he rode around in his car with one of them is not materially significant.

23. It is concluded that WIOO, Inc. has the requisite qualifications to remain a licensee of the Commission and that a grant of the renewal of its license for Radio Station WIOO in Carlisle, Pennsylvania, will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276(d) of the Rules, the application of WIOO, Inc. for renewal of the license of Radio Station WIOO in Carlisle, Pennsylvania IS GRANTED, and the application for a construction permit of Carlisle Broadcasting Associates IS DENIED.[8]

IT IS FURTHER ORDERED that the Broadcast Bureau's Motion to Strike paragraphs 6, 7 and 8 of Carlisle Broadcasting Associates' Reply Findings IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
LENORE G. EHRIG, *Chief Administrative Law Judge*

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[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1983—421-692/09